Supreme Court, U.S.
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NO. _____

In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

SCHOOL CITY OF MISHAWAKA,
Petitioner
v.

FAMILY AND CHILDRENS CENTER, INC.,
Respondent

On Petition for a Writ of Certiorari to the
United State Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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31 pp

QUESTIONS PRESENTED

1. Whether 20 U.S.C. §1415, which provides for the administrative and judicial review of placement decisions under the Individuals with Disabilities Education Act ("IDEA")(20 U.S.C. §1400 et seq.) grants standing (either directly or third-party) to individuals, organizations or entities other than "parents, guardians or surrogate parents."

2. Whether the Family and Children's Center, Inc. has exhausted its administrative remedies as is required under 20 U.S.C. §1415(e) and (f) by filing and pursuing an administrative complaint ("EDGAR") investigation rather than an impartial due process hearing and appeal.

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SCHOOL CITY OF MISHAWAKA,
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FAMILY AND CHILDRENS CENTER, INC.,
Respondent

On Petition for a Writ of Certiorari to the
United State Court of Appeals for the Seventh Circuit

The School City of Mishawaka respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., 1a-16a) is reported at 13 F.3d 1052. The opinion of the district court (App., 17a-35a) is unreported.

JURISDICTION

The court of appeals entered its judgment on January 5, 1994 (App., 1a) and denied the Petition for Rehearing with Suggestion for Rehearing In Banc by Amended Order dated March 17, 1994. (App., 60a)

STATUTORY PROVISION INVOLVED

This case turns on the contrast between the impartial due process hearing procedures available to "parents, guardians and surrogate parents" under Section 1415(b) of the Individuals with Disabilities Education Act ("IDEA")(20 U.S.C. §1400 et seq.)[1], the federal implementing regulation, 34 CFR §300.506, and the Indiana implementing regulation, 511 IAC 7-15-5 and the complaint procedures available to any "organization or individual" under the Education Division General Administration Regulations ("EDGAR") enacted under the authority of 20 U.S.C. §1232c, the federal implementing regulation, 34 CFR §§76.780-83[2], and the Indiana implementing regulation, 511 IAC 7-15-4. The full text of these statutes is set out in the appendix.

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[1] Formerly the Education of the Handicapped Act ("EHA") and the Education for all Handicapped Children Act ("EAHCA").

[2] As noted in OSEP Letter 94-16 (App., 88a-96a), on July 8, 1992, after the FCC filed its original Complaint with the district court, the EDGAR complaint procedures in 34 CFR §§76.780-83 were repealed and replaced with 34 CFR §§300.660-62. The new regulations were enacted under the authority of 20 U.S.C. §2831(a). The new regulations, as did their predecessor, provide that: "An organization or individual may file a signed written complaint under the procedures described in Secs. 300.600-300.661." The FCC invoked the EDGAR complaint procedures during the 1991 administrative process.

STATEMENT

Respondent, Family and Children's Center, Inc. ("FCC") is a state licensed, private child care facility with its main campus and offices within the boundaries of the Petitioner, School City of Mishawaka ("School City"). On May 29, 1992, FCC filed suit in district court against the School City alleging that the School City had violated the provisions of the IDEA by a variety of actions, the chief of which was not compensating the FCC for the use of its facilities for the education of certain disabled children. The district court dismissed the suit finding that the FCC lacked standing under the IDEA. The court of appeals reversed.

A. The Relationship between FCC and the School City.

FCC has approximately 110 children classified as emotionally handicapped, most placed with FCC as a result of court order. (Amended Complaint, para. 5) However, legal custody of these children remains with the placing agencies and/or the parents under Indiana law. Apart from its main campus in Mishawaka, FCC owns and operates two group homes in South Bend where a total of 17 children are housed at any one time. (Id., para. 6)

Prior to 1979 children at FCC received educational services from the School City at its expense. In 1979 as the result of a number of assaults on students and staff and consequent expulsions, FCC removed the children from the School City and began its own school, educating the children at its own expense.[3] FCC initially recouped these expenses

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[3] Prior to early 1970 FCC was an orphanage and shelter for runaway children. In the late 1970's FCC began changing the nature of its residential program to a residential treatment facility for severely emotionally disabled children. Children are placed are at FCC when they cannot be placed locally because of violent conduct or the severity of emotional impairment. Many of the children are sexual offenders or have been the victim of sexual abuse. Approximately one-half of the children are placed in preferred adolescent care units ("PAC") which are staff secure closed wards. These children are incarcerated.

through its per diem charges, however, because of the expanding cost of the program, in 1982 FCC requested School City assistance. The School City assisted FCC by entering into an Instructional Services Agreement with FCC whereby FCC would continue to provide its own teachers and facilities for the program, and the School City would collect transfer tuition for these children and give these funds directly to FCC.

Over the next eight years, the cost of providing an educational program substantially outgrew the revenues generated through the transfer tuition subsidy. These overruns were again charged by FCC back to the agencies as a part of its per diem. In 1990, the FCC determined that it could substantially increase its revenues if it shifted the entire expense of the educational program to the School City, and "decided (unilaterally determined) that School City of Mishawaka should educate all of the children at the Family & Children's Center." (Complaint Investigator's Order of 12/9/91; App., 40a-41a, para. 9)

In response to this demand, the School City agreed to be responsible for providing educational services to the children located at the main campus and in the Mishawaka group home, but declined to be responsible for educating children located in the South Bend group homes, as the School City felt that these students were the responsibility of the South Bend Community Schools, where the students were housed. (Id., 40a, para. 6) The School City also refused FCC's demands that the School City construct or lease a facility on FCC's grounds where the education would take place. (Amended Complaint, para. 23-25)

As the children move through a continuum of treatment, they progressively receive more freedom. This process culminates in placement at one of three group homes. The average stay for a child at FCC is one year. The average cost per child for PAC unit care runs between $70,000.00 and $100,000.00 per year. (See generally Complaint Investigator's Order of 12/9/91; App., 36a-50a)

B. Proceedings Below

On September 17, 1991, FCC filed a complaint with the Indiana Department of Education ("IDOE") seeking an order finding that the School City had violated the IDEA and requiring the School City to educate those children periodically housed in the South Bend group homes, to provide a summer instructional program for the children, to reimburse FCC for the expenses it incurred in educating the children and to require School City to either provide its own facilities to educate the children or to reimburse FCC for the School City's use of FCC's facilities in educating the children. (Complaint Investigator's Order of 12/9/91, App., 37a) The IDOE accepted the complaint under Indiana's EDGAR complaint procedure, 511 IAC 7-15-4, which provides in pertinent part that "(a) Any individual, group of individuals, agency, or organization may file a complaint alleging violations of federal or state laws that apply to special education programs ... ."

The IDOE determined on its own initiative to address FCC's complaint in a two-part manner. The first step was to complete its EDGAR complaint investigation process, and then any remaining issues were to be addressed by way of a hearing before an IDOE hearing officer. (Id., 36a-37a; Hearing Officer's Order of 5/15/92, 57a-58a, para. 2-5) On December 9, 1991, the EDGAR complaint investigator entered Findings of Fact, Conclusions of Law and Order finding against FCC and in favor of the School City. (Complaint Investigator's Order of 12/9/91, App., 36a-50a) FCC requested that the IDOE reconsider this determination, and on January 14, 1992 the IDOE denied FCC's request. (IDOE Appeals Order of 1/14/92, 51-54a) Pursuant to the provisions of EDGAR and 511 IAC 7-15-4(j), on January 27, 1992 FCC appealed the IDOE decision to the Secretary of the United States Department of Education ("USDOE").[4] On

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[4] "A State shall include the following in its complaint procedure: ... (c) The right to request the Secretary to review the final decision of the State." 34 CFR 76.781(c). This provision is specifically noted in the USDOE response of July 22, 1992 and shows clearly that FCC was exhausting EDGAR complaint procedures, not the §1415 impartial

July 22, 1992, the USDOE upheld the IDOE's determination. (USDOE Letter of 7/22/92, App., 55a-56a)

Following its denial of FCC's appeal of the EDGAR findings the IDOE sent the remaining issues to a due process hearing officer. On April 20, 1992, the School City moved to dismiss the due process hearing as the Hearing Officer was without jurisdiction because FCC lacked standing. On May 15, 1992, the Hearing Officer dismissed the remaining claims based upon a lack of jurisdiction. (Hearing Officer's Order of 5/15/92, App. 58a-59a, Order A)

On May 29, 1992, FCC filed its Complaint alleging that the School City violated the IDEA and Indiana common law in the manner in which it dealt with FCC. FCC later amended its complaint dismissing the pendant state law claims and refiling these claims in state court.[5]

The sole jurisdictional invocation in Plaintiff's Amended Complaint is: "2. This Court has jurisdiction pursuant to 28 U.S.C. §1331 as this matter arises under the Individuals with Disabilities Education Act, 20 U.S.C. §1415(e)." (Amended Complaint, p. 17, para. 2) The district court dismissed FCC's Amended Complaint finding that it lacked both direct and third-party standing under §1415. The Seventh Circuit reversed this decision. In rendering its decision, the Seventh Circuit noted that "this case presents the narrow issue of whether Family & Children's Center, Inc. ("FCC") ... should be accorded third-party standing to advocate the rights of children with disabilities" under the IDEA. (App., 1a). In rendering this decision the Seventh Circuit erroneously assumed that the

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due process procedures as there is no provision for secretarial review in §1415 or its implementing regulations.

[5] These claims are currently pending in the St. Joseph Circuit Court, Family and Children's Center v. School City of Mishawaka, et al., Cause No. 71C01-9302-CP-10094. The parties are in the process of settling the pending state law claims raised in that litigation.

EDGAR complaint procedure (511 IAC 7-15-4) was the same as the due process hearing procedure required under §1415(b):

> "By enacting 511 IAC 7-15-4, which permits 'any individual, group of individuals, agency, or organization' to file a complaint alleging the violation of federal laws that apply to special education, like the IDEA, the Indiana legislature has complied fully with the dictates of sec. 1415(b). In other words, the Indiana legislature has invited FCC to initiate the state administrative process required by sec. 1415(b) as a condition of federal assistance for the education of Indiana's children with disabilities. And the IDEA clearly authorized Indiana to do so. The record shows that FCC exhausted its state remedies as an aggrieved party is required to do by subsection (b) before filing suit. Thus, FCC was entitled to proceed under paragraph (2) of sec. 1415(e)."

(Id., 13a-14a). The Seventh Circuit thus held that Indiana, by enacting its EDGAR complaint procedure, accorded FCC standing under §1415(b) and (e).

REASONS FOR GRANTING THE PETITION

In rendering its decision the court of appeals simply ignored the clear distinction between EDGAR complaint procedures (511 IAC 7-15-4 is a response to a Congressional mandate made under 20 U.S.C. §1232c and its implementing regulations, 34 CFR §76.780-83), and the due process hearing proceedings mandated and implemented under the IDEA (511 IAC 7-15-5 is a response to a Congressional mandate made under 20 U.S.C. §1415(b) and its implementing regulation, 34 CFR 300.506). In finding that FCC had standing to invoke the impartial due process hearing procedure under the IDEA, in addition to ignoring the express language of the statutes and regulations, the court of appeals also overlooked clear Congressional intent, the findings of the First, Second, Ninth and Tenth circuits, as well as several district and state courts and the express position

of the USDOE. The decision is erroneous, and the issues that it addresses are important.

I. The Court of Appeals interpretation of 20 U.S.C. §1415(b) conflicts with the holdings of the First, Second, Ninth and Tenth circuits.

The Seventh Circuit's decision extends third-party standing under the procedural due process provisions of the IDEA to a private organization which acknowledges that it is neither "parent, guardian, or surrogate parent" to the disabled children or a public agency.[6] The decision to extend third-party standing to initiate due process hearing procedures under the IDEA by individuals or organizations other than parents, guardians, surrogate parents, or a public agency is in conflict with decisions of the First, Second, Ninth and Tenth circuits, as well as numerous other courts and the position of the USDOE.

These conflicts arise in two fashions, first, the Seventh Circuit's decision is in direct conflict with those courts which have held that standing to invoke the due process hearing procedures of the IDEA are limited to "parents, guardians, and surrogate parents"[7], and second, the

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[6] "As the terms are defined by statute and regulation, FCC is neither parent, guardian, nor surrogate parent to the Handicapped Children." (FCC's Appellant's Brief, p. 22).

[7] Courts holding that standing to invoke the due process hearing procedures under §1415(b) is limited to the statutorily mandated "parents, guardians and surrogate parents" are: Andrews v. Ledbetter, 880 F.2d 1287 (11th Cir. 1989); Susan R.M. v. Northeast Independent School District, 818 F.2d 455 (5th Cir. 1987); U.S. v. Tennessee, 798 F.Supp. 483 (W.D.Tenn. 1992); Seneca Falls School District v. Liverpool School District, 728 F.Supp. 910 (W.D.N.Y. 1990); Gehman v. Prudential Property and Casualty Insurance Co., 702 F.Supp. 1192 (E.D.Pa.1989); Allstate Insurance Company v. Bethlehem Area School District, 678 F.Supp. 1132 (E.D.Pa. 1987); Andrew H. v. Ambach, 600 F.Supp. 1271 (N.D.N.Y. 1984); Juneau Academy v Chicago Board of Education, 461

manner in which the Seventh Circuit reached its decision, i.e. equating an EDGAR complaint procedure with a §1415 due process hearing procedure, is in direct conflict with the decisions of the First, Second, Ninth and Tenth circuits, as well as several district and state courts and the position of the United States Department of Education.[8]

The Court should grant certiorari to review these important conflicts.

II. The Decision of the Court of Appeals is Erroneous.

A. The Seventh Circuit improperly determined that Indiana's EDGAR complaint procedure is identical to its §1415(b) due process hearing procedure.

As noted previously, jurisdiction has been invoked by FCC solely under §1415(e) and FCC's standing must be examined under that provision alone. Primate Protection League v. Tulane, 500 U.S. 74 (1991).

N.E.2d 597 (Ill.App. 1984); Nelson v Tuscadora Intermediate Unit No. 11, 500 Pa. 458, 457 A.2d 1260 (1983) cert. denied, 464 U.S. 866 (1983). But see Arons v. New Jersey State Board of Education, 1987 WL 10808 (D.N.J. 1987) aff'd on other grounds 842 F.2d 58 (3rd Cir. 1988), cert. denied, 488 U.S. 942 (1988).

[8] The following courts have held that the EDGAR complaint procedure is separate and distinct from the due process hearing procedure in §1415(b): Christopher W. v. Portsmouth Sch. Comm., 877 F.2d 1089, 1091 n. 2 (1st Cir. 1989); Mrs. W. v. Tirozzi, 832 F.2d 748, 751 (2nd Cir. 1987); Hoeft v. Tucson Unified School District, 967 F.2d 1298, 1300 (9th Cir. 1992); Association for Community Living in Colorado et al. v. Romer, 992 F.2d 1040, 1045 (10th Cir. 1993); Learning Disabilities Association of Maryland v. Baltimore County, 837 F.Supp. 717, 722, n. 11 (D.Md. 1993); Stauffer v. Wm. Penn School Dist., 829 F.Supp. 742, 743-744 n. 4 (E.D.Pa. 1993); Richards v. Fairfax County School Board, 798 F.Supp. 338, 342 (E.D.Va. 1992); Mrs. W. v. Tirozzi, 706 F.Supp. 164, 168 (D.Conn. 1989); Wilson v. School District No. 1, Multnomah County, 69 Or.App. 63, 686 P.2d 385, 388 (1983). The USDOE has also expressly stated that these are two separate procedures, both before (Letter to Johnson, 18 IDELR 589, 590-591 (OSERS, 1991)(App., 84a-85a) and after this decision. (OSEP Letter 94-16 (App., 91a)

The Seventh Circuit determined that because FCC was granted the right, under Indiana law, to initiate EDGAR complaint proceedings as "an organization or individual" it also had the right to initiate §1415 due process hearing procedures including having standing to file this suit under §1415(e)(2). The Seventh Circuit is in error in its basic assumption that the EDGAR complaint process provided for in 511 IAC 7-15-4 is the same as the due process hearing procedure referred to in §1415(b), it is not.

The flaw in the Seventh Circuit's opinion is the assumption that 511 IAC 7-15-4 was designed in response to the procedural requirements of §1415(b) it was not. In reality, as noted above, 511 IAC 7-15-4 is a response to the EDGAR requirements and has nothing to do with the due process hearing procedures under §1415(b). The Seventh Circuit, as did the district court, unfortunately confused Indiana's EDGAR complaint procedure (511 IAC 7-15-4) with the §1415(b) due process hearing procedures found at 511 IAC 7-15-5.[9]

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[9] The confusion of the Seventh Circuit is somewhat understandable because of the proximity of the EDGAR complaint procedure and the §1415(b) due process hearing procedure in the Indiana Administrative Code. This is further compounded by the fact that the word complaint is used both in EDGAR and in §1415(b). However, the two are clearly distinguishable. For example EDGAR complaints under 511 IAC 7-15-4 may be filed by "an individual, group of individuals, agency, or organization", about any issue "alleging violations of [any] federal or state laws that apply to special education." In addition, the State Educational Agency ("SEA") directly investigates these complaints by appointing a complaint investigator who is an employee of the SEA, there are no due process rights or a hearing in the complaint investigation, and the only appeal is to the USDOE. The remedy against a school that is found in violation of 511 IAC 7-15-4 is the withholding of federal funds. In contrast under 511 IAC 7-15-5 only a "parent, a public agency, or the state education agency may initiate a due process hearing", and may do so only about issues surrounding "the provision of a free and appropriate public education for the student." The SEA appoints an independent hearing officer who may not be an employee of the SEA, there are complete due process rights and a hearing, and there is a multi-tier appeals process (511 IAC 7-15-6) whereby the hearing officer's decision may be appealed to the Board of Special Education Appeals and then suit may be filed in court. The remedy for a violation of 511 IAC 7-15-5 is injunctive relief directing the school to provide the child with a FAPE, compensatory damages, and attorneys fees. Additional evidence that 511

The difference between EDGAR complaint procedures and §1415(b) due process hearing procedures has been described as follows:

> "The EDGAR procedures are different in both purpose and scope from those in the IDEA and do not provide parents who file complaints with the same opportunities for a full administrative hearing and judicial review. See Richards v. Fairfax County Sch. Bd., 798 F.Supp. 338, 342 (E.D.Va. 1992). Unlike EDGAR, the IDEA was carefully tailored to ensure that complainants receive the benefits of a full administrative hearing prior to seeking judicial review and that the reviewing court has the benefit of an administrative record."

Association for Community Living in Colorado et al. v. Romer, 992 F.2d 1040, 1045 (10th Cir. 1993).[10]

IAC 7-15-4 was not enacted under §1415(b) is the fact that the procedures outlined do not meet the minimal procedural requirements of §1415(b). There is also no right of appeal to the USDOE in the §1415(b) procedures (511 IAC 7-15-5 and 6) as is required under EDGAR. Further distinctions, including a detailed legislative history, will be provided in the Amicus Brief being filed by the State of Indiana.

[10] "In addition to the IDEA's procedural safeguards for ensuring parental involvement in the educational decisionmaking process, federal regulations provide an administrative mechanism for ensuring state compliance with federally funded education programs, including the IDEA. The Education Division General Administration Regulations (EDGAR) require states to adopt a formal procedure for receiving and resolving complaints that the state or local education agency is violating the IDEA or its regulations. The state EDGAR complaint procedure is to include a time limit of 60 days for the state to investigate and resolve complaints, to be extended only under 'exceptional circumstances.' A complainant dissatisfied with the state's disposition of an EDGAR complaint may request review of the state's decision by the U.S. Secretary of Education." Hoeft v. Tucson Unified School District, 967 F.2d 1298, 1300 (9th Cir. 1992)(citations omitted); "Under the General Provisions Concerning Education, 20 U.S.C. §1221, et seq., Congress authorized the Secretary of Education to require the state to submit a plan for monitoring compliance by local agencies with various federal educational requirements. 20 U.S.C. §1232c(a). The Secretary may require such plan to provide ... and (3) that the state investigate and resolve all complaints received by the state relating to the administration of such

Every court which has addressed this issue, with the exception of the Seventh Circuit, has acknowledged that the EDGAR complaint procedure is separate and independent from the IDEA. Because the two are unrelated, standing to invoke EDGAR procedures is simply irrelevant to standing to invoke the due process hearing procedures under §1415(b) and (e). See Christopher W. v. Portsmouth Sch. Comm., 877 F.2d 1089, 1091 n. 2 (1st Cir. 1989)("EDGAR provides an administrative mechanism for assuring that a state complies with state-administered federal programs, including the [IDEA]. EDGAR is to be distinguished from the specific administrative complaint procedures detailed in the [IDEA] itself."); Mrs. W. v. Tirozzi, 832 F.2d 748, 751 (2nd Cir. 1987); Hoeft v. Tucson Unified School District, 967 F.2d 1298, 1300 (9th Cir. 1992); Association for Community Living, supra., 992 F.2d at 1043; Learning Disabilities Association of Maryland v. Baltimore County, 837 F.Supp. 717, 722, n. 11 (D.Md. 1993); Richards v. Fairfax County School Board, 798 F.Supp. 338, 342 (E.D.Va. 1992); Mrs. W. v. Tirozzi, 706 F.Supp. 164, 168 (D.Conn. 1989); Wilson v. School District No. 1, Multnomah County, 69 Or.App. 63, 686 P.2d 385, 388 (1983). Furthermore, OSERS[11] in Letter to Johnson, 18 IDELR 589, 590-591 (OSERS, 1991)(App., 84a-85a)(parenthetical supplied) stated as follows:

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programs. Id. ... Thus authorized, the Secretary adopted 34 C.F.R. §§ 76.780-76.783 and thereby required states to provide a Complaint Review Procedure." Mrs. W. v. Tirozzi, 706 F.Supp. 164, 168 (D.Conn. 1989). The sole purpose of EDGAR is to ensure, through an administrative oversight process, that all types of federal education funds under a variety of programs are being used properly by states, not just funds received under the IDEA. There is no provision for judicial review in EDGAR, "[a] complainant dissatisfied with the state's disposition may request review of the state decision by the U.S. Secretary of Education, 34 CFR §76.781(C), who is authorized to withhold federal funding from a state found to be in noncompliance with the IDEA." Learning Disabilities Association of Maryland v. The Board of Education of Baltimore County, 837 F.Supp. 717, 722 n. 10 (D.Md. 1993).

[11] The Office of Special Education and Rehabilitative Services of the United States Department of Education ("OSERS"). The Office of Special Education Programs ("OSEP") is a Congressionally created agency charged as "the principal agency in the Department [of Education] for administering and carrying out this chapter ... ." (20 U.S.C. §1402(a))

> "The due process [§1415(b)] and [EDGAR] complaint procedures are two separate, distinct, or independent remedies available to students with disabilities and their parents, to resolve issues of disagreement between parents and local school districts."

See also Letter to Robb, 17 EHLR 468, 469 (OSERS, 1990)(App., 98a-99a).

The distinction between EDGAR procedures and the due process hearing procedure under §1415(b) and the problems inherent in mixing the two is best illustrated in Association for Community Living, supra. This case involved a class action brought by certain organizations, four disabled children and their parents (collectively "ACL") against the Colorado Department of Education ("CDE") alleging that the children were deprived of certain rights guaranteed under the IDEA. The procedural posture of the case was as follows:

> "The plaintiffs did not pursue the administrative remedies available under the IDEA, but did file a complaint with CDE pursuant to Colorado's EDGAR complaint procedure. Dissatisfied with the resolution of their EDGAR complaints, ACL brought this civil action pursuant to 20 U.S.C. §1415(e)(2). CDE moved to dismiss for failure to exhaust administrative remedies under the IDEA. The district court denied the motion and granted partial summary judgment for ACL. After ordering revision of CDE's extended school year guidelines, the district court granted CDE's motion for summary judgment and ACL appealed."

Id., 992 F.2d at 1043 (emphasis supplied).

The issue before the Tenth Circuit was whether the ACL had exhausted their administrative remedies as required in §1415(e)(2) when they had failed to utilize the due process hearing procedures under §1415(b)(2) and had only exhausted the EDGAR complaint procedures. This is identical to what FCC has done in the present case. The court

found that the ACL failed to exhaust their administrative remedies under §1415(e) and directed the dismissal of the case for lack of jurisdiction.

> "Judicial review under 20 U.S.C. §1415(e)(2) is normally not available until a plaintiff has exhausted the administrative remedies provided under §§ 1415 (b)(2) and (c).
>
> * * *
>
> We also conclude that the complaint ACL filed pursuant to Colorado's EDGAR procedures is not an adequate alternative to exhausting administrative remedies under the IDEA. Although the EDGAR complaint did notify CDE of the alleged violations and afford it an opportunity to correct the alleged error, it did not further any of the other purposes of the exhaustion requirement. The EDGAR procedures are different in both purpose and scope from those in the IDEA and do not provide parents who file complaints with the same opportunities for a full administrative hearing and judicial review. Unlike EDGAR, the IDEA was carefully tailored to ensure that complainants receive the benefits of a full administrative hearing prior to seeking judicial review and that the reviewing court has the benefit of an administrative record. Id. Allowing plaintiffs to file EDGAR complaints in lieu of exhausting administrative remedies under the IDEA would undermine these goals."

Id., 992 F.2d at 1043-1045 (citations omitted).

The Tenth Circuit opinion makes two points relevant to this case. First, that the EDGAR complaint procedure is entirely separate from the due process hearing procedure under §1415(b), directly contradicting the Seventh Circuit's findings, and second that the exhaustion requirement of §1415(e) can only be met by the exhaustion of the §1415(b) due process hearing procedures, not the EDGAR complaint procedures.

The present case is no different.[12] As the Seventh Circuit correctly notes, FCC has exhausted the EDGAR complaint procedure, 511 IAC 7-15-4, but has not (and under the applicable statutes and regulations could not have) exhausted the due process hearing procedures under §1415 (b), 511 IAC 7-15-5. Thus FCC is not (and could not be) a "party aggrieved by the findings and decisions made under subsection (b)" and therefore there is no "right to bring a civil action with respect to the complaint" under §1415(e)(2).

The scope of Indiana's EDGAR procedure is simply irrelevant to the question of whether FCC has standing under §1415. The proper inquiry is whether Indiana's §1415(b) due process hearing procedure (511 IAC 7-15-5) grants standing to FCC as part of "a broad group of plaintiffs", and the answer is that it does not. 511 IAC 7-15-5, like §1415(b)[13] and 34 CFR 300.506[14], expressly limits standing under §1415(b) to parents (guardians and surrogate parents) and public educational agencies. Thus the rationale for invoking the usual prudential restraints on judicial review remain, and all of these clearly support denying FCC third-party standing under §1415. Because FCC has no right to bring a civil action under §1415(e)(2), the only section cited by them in invoking the jurisdiction of the district court, the district court correctly

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[12] The only important difference between the two cases is that in Association for Community Living parents and children with disabilities were actual class members, thus not implicating the standing issues raised in this case. The exhaustion issue is the same.

[13] §1415(b)(2) specifically limits the individuals who can convene a due process hearing. Only "the parent or guardian shall have an opportunity for an impartial due process hearing ... ." While the states are free to adopt a more broad procedure Indiana has not done so.

[14] As noted previously, the USDOE, consistent with its mandate under the IDEA (20 U.S.C. §1413), has promulgated specific regulations limiting who may convene a due process hearing: "A parent or a public educational agency may initiate a hearing ... ." 34 CFR 300.506. Any state regulation that would broaden this class would run afoul of this regulation and the state would be denied federal funding as a consequence.

determined that it lacked jurisdiction over this matter and the Seventh Circuit is in error.

B. The Seventh Circuit erroneously found that the FCC had exhausted its administrative remedies.

The Seventh Circuit correctly acknowledged that exhaustion of administrative remedies is a prerequisite for suit under the IDEA, however, it erred when it found that the exhaustion of EDGAR complaint procedures was the same as exhausting the due process hearing procedures under §1415(b). See Association for Community Living, supra.; Richards v. Fairfax County School Board, 798 F.Supp. 338, 342 (E.D.Va. 1992)("If the plaintiffs are deemed to have exhausted their remedies under the statute [§1415(e)] simply by resorting to the EDGAR procedures, the appeals process set forth in the [IDEA] will be entirely frustrated.")

III. The Questions Presented are Important.

The questions presented in this case are important for three reasons. First, the Seventh Circuit's decision is not limited to Indiana, but is applicable to every state in the Union as they have (and are required by law to have) identical EDGAR complaint and due process hearing procedures. Second, the Seventh Circuit's decision clearly contradicts the intent of Congress in enacting the IDEA by allowing the intercession of third parties into educational decisions which both Congress and this Court have acknowledged are best made by parents and educators alone. Finally, the importance of these issues and the substantial confusion generated by this decision warrant clarification by this Court.

A. Impact beyond Indiana.

Every state has regulations substantially identical to those of Indiana. This is, as this Court has noted, because the IDEA "conditions

federal financial assistance upon a State's compliance with the substantive and procedural goals of the Act." Honig v. Doe, 484 U.S. 305, 310 (1988). This includes implementing both EDGAR complaint procedures by providing for regulations allowing "[a]n organization or individual" to file a complaint (34 C.F.R. 300.662) and §1415 due process hearing procedures which are open to "a parent or public agency." (34 C.F.R, 300.506) Contained within the Appendix to this pleading is a state by state comparison containing the pertinent individual state regulations. (App., 117a-142a) As can be seen from this analysis, every state has provisions substantially identical to those of Indiana, and consequently every state would similarly be affected by the Seventh Circuit's decision finding that by adopting broadly accessible EDGAR complaint procedures as mandated by USDOE they have implicitly opened their due process hearing procedure to any organization or individual.

B. The Seventh Circuit's decision will have profound and dramatic consequences on the education of disabled children throughout the nation.

In 1975, Congress began work on the comprehensive act which was the framework for the current IDEA (P.L. 94-142). P.L. 94-142 made a great deal of changes to the Education for the Handicapped Act, including renaming it the Education for all Handicapped Children Act of 1975. With respect to due process provisions (§1415 requirements), both the House and the Senate versions of the bill essentially reenacted the procedures contained in the EHA. (S. Conf. Rep. No. 94-455, p. 47-48; 2 U.S. Cong. & Admin.News '75, p. 1500-1501) In so doing both bodies maintained the requirements that an individual be either a parent, guardian, or surrogate parent in order to have standing under the statute. (Id.)

However, in addition the Senate bill (S. 6) contained a provision for allowing due process hearings under §1415 for complaints made by individuals other than parents, guardians or surrogate parents:

"The Committee bill provides that as a condition of eligibility there be established in the State an entity for insuring compliance with the provisions of the Act. Under the provisions of the Committee bill, such entity shall (1) conduct public evaluations in all areas of the State to determine whether the State educational agency and local educational agencies are in full compliance, (2) **be empowered to receive complaints with respect to alleged violations of the requirements of the Act and provide notice and an opportunity for hearings with respect to such complaints**, (3) make determinations with respect to alleged violations, and, upon finding that a violation has occurred, notify the State educational agency and the appropriate local educational agency of such finding, and (4) take appropriate steps to assure that such violations are corrected."

(S. Rep. No. 94-168, p. 27; 2 U.S. Cong. & Admin.News '75, p. 1450)(emphasis supplied).

Reservations were expressed on the floors of both legislative bodies, perhaps best exemplified by Senator Dole's comments regarding the burden such universal due process procedures would have on the state educational agency:

"As we were indicating, based on the number of handicapped children stated in this bill, if only 1 percent of the parents or guardians of handicapped children should make complaints, that would be somewhere in excess of 80,000 complaints presented to compliance entities across the country. Such a volume of complaints, although only a small portion of what might be possible would clearly be a severe administrative burden on a compliance entity, the members of which may or may not be qualified to handle. **Further, since the provision states that "complaints from individuals" must be received, this would allow any individual, not simply a parent or guardian, to complain to the entity.**"

121 Cong.Rec. 19499 (1975)(remarks of Sen. Dole). As a consequence of these types of concerns, this provision which would have provided the right to initiate due process proceedings and have hearings under §1415 to individuals other than parents, guardians and surrogate parents was stripped from the final bill. See Smith v. Robinson, 468 U.S. 992, 1012, n. 16 (1984) (Noting the deletion of this mechanism from the final legislation.)

Every Congressional enactment since that date dealing with the IDEA, as well as every court decision, has reemphasized the intent to limit educational decision and due process rights under §1415(b) and (e) to parents and educators alone.[15] However, the Seventh Circuit's decision has the contrary result, rather than maximizing parental involvement in the education of each child, the decision actually dramatically reduces parental involvement by allowing "an individual, group of individuals, agency, or organization" to interfere in the placement decisions reached by the parents and the School.

The impact of this ruling is to grant a variety of third-parties the right to intercede into educational placement decisions reached by parents and educators who Congress clearly intended not to be involved. For example, consider a mildly mentally handicapped individual with AIDS who is currently being served in a self-contained classroom. Both school and parents agree that he/she would benefit from being mainstreamed with peers, however, a group of citizens feels that such a placement would be dangerous to other children. Prior to the Seventh Circuit's decision the parent's placement decision would go into immediate effect despite these objections. However, under the Seventh Circuit's decision the citizens' group would now have standing to file for a due process proceeding challenging the proposed change in placement. As a consequence of the "stay-put" provisions of the IDEA (34 CFR §300.513), the child could

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[15] In Hendrick Hudson District Board of Education v. Rowley, 458 U.S. 176 (1982), the seminal case under the IDEA, this Court noted that the IDEA's procedures reflected "Congress' effort to maximize parental involvement in the education of each handicapped child." Id., 458 U.S. at 182 n. 6.

remain in the more restrictive placement until due process proceedings are completed. Similar problems could arise with respect to non-custodial parents relitigating custody disputes under the guise of educational placement decisions (Susan R.M. v. Northeast Independent School District, 818 F.2d 455 (5th Cir. 1987)) and insurance companies challenging placements on the basis that they might be liable for some portion of the costs. Allstate Insurance Company v. Bethlehem Area School District, 678 F.Supp. 1132 (E.D.Pa. 1987); Gehman v. Prudential Property and Casualty Insurance Co., 702 F.Supp. 1192 (E.D.Pa. 1989). Such suits would frustrate the entire purpose of the IDEA.

This decision also opens the courtroom doors to hundreds of private schools who provide services to handicapped children to initiate administrative proceedings and sue public schools under the IDEA for support in providing educational services and facilities under the IDEA to their children. Thus in Zobrest v. Catalina Foothills School District, -- U.S. --, 113 S.Ct. 2462, 125 L.Ed.2d 1 (1993) under the Seventh Circuit's decision the Roman Catholic High School could have sued the Catalina Foothills School District directly under the IDEA to force the School District to serve Larry Zobrest, and the elders of Kiryas Joel could have sued the state directly under the IDEA to attempt to obtain an independent school district for their children, and FCC can sue for additional financial support. This is certainly an unusual result given this Court's statement in Zobrest that: "Handicapped children, not sectarian schools, are the primary beneficiaries of the IDEA; to the extent sectarian school benefit at all from the IDEA, they are only incidental beneficiaries. Thus, the function of the IDEA is hardly 'to provide desired financial support for nonpublic, sectarian institutions.'" Id., 113 S.Ct. at 2468. Yet this is precisely what the Seventh Circuit has allowed by granting any individual or organization third-party standing under the IDEA. The FCC may initiate administrative proceedings and sue the School City to obtain "desired financial support" thus making the FCC, not the children the "primary beneficiar[y] of the IDEA." This certainly does not seem to be the desired intent of this Court in Zobrest. Under the Seventh Circuit's decision every private religious school from Kiryas Joel to the Roman

Catholic High School in Arizona now has the right to file suit directly under the IDEA. If these schools alone begin to exercise the rights granted by the Seventh Circuit, a new wave of cases will arrive before this Court brought not by parents but by activists at the schools themselves. Not to mention cases filed by other organizations and advocacy groups This is in direct contradiction to Congressional intent and this Court's interpretation of the IDEA and will result in third-parties utilizing disabled children as pawns in litigation to further their own financial self interests as FCC has done in the present litigation, and it is important that this Court address this issue.

C. USDOE Clarification Letter.

The necessity for clarification from this Court can also be seen by the manner in which the USDOE has had to respond to the Seventh Circuit's decision. Prior to this decision the USDOE stated as follows: "One point I must stress, is that parents or guardians and schools are the only two parties (with the exception of surrogate parents) with the right and responsibility for initiating due process procedures." Letter of VanOsdol, EHLR 211:72, 74 (OSEP, 1978)(App., 105a).[16] However, less than two months after the Seventh Circuit's decision, on March 22, 1994, OSEP issued a seven page memorandum to the Chief State School Offices in all fifty states containing "information about (1) the relationship between the complaint resolution and due process hearing procedures in the part B regulations... ." (App., 89a) This memorandum very clearly states USDOE's position that contrary to the Seventh Circuit's finding, EDGAR complaint review procedures are open to everyone including parents but

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[16] OSEP has also specifically held that an institution identical to the FCC cannot legally represent the interests of the children as it has a direct conflict of interest with them. Letter to Kirk, EHLR, 211:243 (OSEP, 1980)(App., 107a-110a). See also Edmonds, Washington School District No. 15, EHLR 257:198, 199 (OCR, 1980) (Noncustodial parent has no standing to request a hearing under §1415(b))(App., 111a-116a).

that due process hearing procedures are only open to parents, and that these are two separate and distinct procedures.

> "C. Relationship Between the Complaint Management and Due Process Hearing Systems
>
> Under the part B regulations, parents of children with disabilities have two separate means available to them for resolving disputes with public agencies concerning the education of their children -- i.e., (1) the complaint management system required in §§300.660-300.662 (which is the subject of this memorandum), and the impartial due process hearing system required in §§300.506-300.513.
>
> The State complaint procedures are available for resolving any complaint that meets the requirements of §§300.662, including (1) complaints that raise systemic issues, and (2) individual child complaints that are filed by parents."

(Id., 91a).

The fact that USDOE felt it necessary to issue a memorandum to all fifty states to clarify its position that the EDGAR complaint procedure is wholly separate from the §1415(b) due process hearing procedure just two months after the Seventh Circuit's opinion indicates both the erroneous nature of the Seventh Circuit's opinion, as well as the important potential adverse impact of this decision on disabled children and special education proceedings.

In sum, there is a clear conflict between the circuits on a matter of importance to the courts, disabled children and their advocates, school corporations, the individual states, and the federal government. This case presents a unique opportunity for this Court to address the disputed issues and ensure that "Congress' effort to maximize parental involvement in the education of each handicapped child" is implemented, rather than thwarted. Therefore, the Court should grant the petition.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

NO. _____

In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

SCHOOL CITY OF MISHAWAKA,
Petitioner
v.

FAMILY AND CHILDRENS CENTER, INC.,
Respondent

On Petition for a Writ of Certiorari to the
United State Court of Appeals for the Seventh Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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In the

United States Court of Appeals

For the Seventh Circuit

No. 93-1843

FAMILY & CHILDREN'S CENTER, INC.,

Plaintiff-Appellant,

v.

SCHOOL CITY OF MISHAWAKA,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Indiana, South Bend Division.
No. 92 C 327—Allen Sharp, *Chief Judge.*

ARGUED SEPTEMBER 27, 1993—DECIDED JANUARY 5, 1994

Before CUMMINGS and FLAUM, *Circuit Judges*, and WILL, *District Judge.**

FLAUM, *Circuit Judge.* This case presents the narrow issue of whether Family & Children's Center, Inc. ("FCC"), an Indiana non-profit corporation which operates a licensed, private child care facility, should be accorded third-party standing to advocate the rights of children with disabil-

* The Honorable Hubert L. Will, of the Northern District of Illinois, sitting by designation.

ities[1] who have been placed in its physical but not legal custody by court order or as a result of action by state or local child welfare departments. FCC seeks an order declaring that the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400-85 (1990 & Supp. 1993), obligates School City of Mishawaka ("School City"): (1) to provide classrooms and related facilities for the education of the children with disabilities, and (2) to educate the children with disabilities placed with FCC who are periodically and temporarily cared for at two group homes owned by FCC and located in the City of South Bend. Following oral argument, the district court granted School City's motion to dismiss under Rule 12(b)(1) of the Federal Rules of Civil Procedure on the ground that FCC lacks standing to assert claims under the IDEA. We reverse.

I.

FCC is an Indiana non-profit corporation which operates a licensed, private child care facility. FCC's main campus and offices are located in Mishawaka, Indiana. In addition, FCC owns and operates three group homes, one in Mishawaka and two in South Bend. Between the main campus and the group homes, FCC cares for approximately 110 emotionally handicapped children at any given time. FCC has actual physical custody of the children as the result of either court order or action by state or local welfare departments, but FCC is neither legal guardian, parent, or surrogate parent to any of these children. Legal custody of these children, in fact, remains either with the

---

[1] Although the phrase "handicapped children" was used in the statute at the commencement of this litigation and has been used by the parties throughout, Congress, in the interim, has amended the IDEA to refer to "children with disabilities." Pub. L. 101-476, 104 Stat. 1145, Oct. 30, 1990. This opinion will use the phrase "children with disabilities" or simply the word "children" where appropriate.

courts, the placing agencies,[2] or the parents under the laws of Indiana. School City is a consolidated school corporation operating pursuant to the laws of the State of Indiana. School City is primarily responsible for educating students from the City of Mishawaka.

Until 1979, children with disabilities in the Mishawaka area attended the Mishawaka public schools. In that year, responding to the large number of children with disabilities who had been suspended or expelled from school because of behavior related to their handicaps, FCC began its own school and started educating the children at its own expense. In 1982, FCC and School City entered into an Instructional Services Agreement (the "Agreement") by which School City agreed to provide FCC with 95% of transfer tuition monies received from the children's home counties and FCC agreed to continue its educational program for the children. The Agreement proved satisfactory for a number of years, but, by 1989, an increase in

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[2] According to the administrative record, the following agencies placed children at FCC during the period considered by the Indiana Department of Education (IDOE) in its investigation of the issues raised in FCC's complaint:

Indiana Department of Public Welfare (DPW)	133
Various County Probation Departments (P)	69
S-5 Residential Placements (S-5)	5
Cook County (Illinois) DCFS (DCFS)	4
Kane County (Illinois) Juvenile Court (KCJ)	1
Indiana Department of Education (DOE)	1
Arizona Adoption Subsidy (AAS)	1
VAN	1
Unknown (UKN)	1
	216

Of these 216 children, 104 were referred by FCC to School City for special educational services. 101 of these 104 had "surrogate parents" appointed for them pursuant to 511 IAC 7-9-1 and in compliance with 20 U.S.C. § 1415(b)(1)(B). The remaining three children did not require "surrogate parents" because their parents were available.

the number of children placed with FCC and the degree of emotional impairment suffered by many of the children caused FCC to seek a new arrangement.

Despite years of negotiation, FCC and School City have been unable to reach a new accord satisfactory to both parties. FCC insists that School City is shirking its statutory duty to provide a "free appropriate public education to children with disabilities." In particular, FCC and School City have locked horns over two issues: facilities and the group homes. School City contends that it has no obligation to provide classrooms and related facilities for the education of children on FCC's campus. According to School City, FCC must provide the facility at its own cost while School City would provide the staff and educational program. In other words, School City refuses to pay rent and related expenses associated with School City's use of FCC's facilities. School City also has taken the position that it has no obligation to educate the children placed with FCC who are periodically and temporarily treated at one of the South Bend group homes. FCC submits that the group home environment is an important facet of its overall treatment program. Prior to School City's refusal to educate children at the group homes, FCC frequently transferred children between the main campus and the group homes. Recently, however, FCC has chosen not to place many children in the group homes, despite the fact that their situation otherwise would call for such treatment, because of the anxiety and hardship associated with transferring to a different school system with different teachers and curriculum.

FCC then turned to the administrative and judicial procedures available under the IDEA, 20 U.S.C. § 1400 *et seq.* The IDEA was enacted:

> to assure that all children with disabilities have available to them . . . a free appropriate public education that emphasizes special education and related services designed to meet their unique needs, to assure that the rights of children with disabilities and their par-

> ents or guardians are protected, to assist States and localities to provide for the education of all children with disabilities, and to assess and assure the effectiveness of efforts to educate children with disabilities.

20 U.S.C. § 1400(c). The IDEA conditions federal assistance upon a state's compliance with the substantive and procedural goals of the Act. *See Hendrick Hudson Central Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982). Section 1415(b) of the IDEA requires states to provide an impartial administrative process that assures compliance with the federal mandate of a "free appropriate public education" by the relevant state agencies. Indiana's procedural safeguards are codified at 511 IAC 7-1-7. According to the IDEA, the required process "shall include, but shall not be limited to" an opportunity for parents, guardians, or surrogates to examine records and file complaints with state or local education authorities. 20 U.S.C. § 1415(b). As the district court noted, the scope of Indiana's regulatory scheme extends beyond the minimum required by § 1415 in that it permits "[a]ny individual, group of individuals, agency, or organization" to file a complaint alleging violation of federal or state laws that apply to special education. 511 IAC 7-15-4. Finally, the IDEA provides a right of action in federal district court, 20 U.S.C. § 1415(e), but only after a prospective plaintiff has exhausted state administrative remedies. *See Doe By and Through Doe v. Smith*, 879 F.2d 1340 (6th Cir. 1989), *cert. denied*, 493 U.S. 1025 (1990).

On September 17, 1991, FCC filed a complaint with the Indiana State Department of Education (the "Department") pursuant to 511 IAC 7-15-4. FCC asked the Department to direct School City to (1) provide facilities, teachers, and staff for the education of the children, (2) educate the children who are housed from time to time in the group homes, (3) pay FCC for the fair rental value of FCC's facilities used to educate the children, (4) reimburse FCC for its expenses in educating the children, and (5) provide year-round education for those children who require it.

The Department addressed FCC's petition in a two-part manner. First, the Department referred the matter to its Division of Special Education (the "Division") for an investigation into whether School City had violated Indiana education regulations. On December 9, 1991, the Division entered its findings of fact, conclusions of law, and an order deciding against FCC. FCC filed a Request for Reconsideration which the Division denied on January 14, 1992. FCC then appealed the Division's findings, under 511 IAC 7-15-4(j), to the United States Department of Education which declined to hear the appeal on July 22, 1992.

Second, the Department, over the objection of FCC, determined that the question of whether School City is obligated to provide classrooms and related facilities for the children should be resolved as a transfer tuition matter rather than as a special education matter. As a result of this determination, on May 15, 1992, the Department dismissed the part of FCC's petition dealing with facilities because transfer tuition only can be received by a school corporation and FCC was not a school corporation.

Having exhausted its state remedies, FCC filed suit in the United States District Court for the Northern District of Indiana, South Bend Division on May 29, 1992. In its original complaint, FCC asserted four claims under IDEA and three claims under Indiana law. On December 4, 1992, School City filed a motion to dismiss FCC's claims under IDEA for lack of standing. School City also requested that the district court decline to exercise supplemental jurisdiction over FCC's state law claims. On February 16, 1993, FCC moved for leave to amend its complaint and to dismiss without prejudice its state law claims. The district court granted FCC's motion on February 24, 1993. In its amended complaint, FCC narrowed its claim to a request for an order declaring that School City is obligated to: (1) provide classrooms and related facilities in educating the children with disabilities, and (2) educate the children with disabilities placed with FCC who are periodically and temporarily cared for at the South Bend group homes.

Following oral argument, on March 19, 1993, the district court granted School City's motion to dismiss for lack of standing. Evidently drawing upon the language of § 1415(b), the court framed the standing inquiry as "whether FCC can, under IDEA, become surrogate parents or guardians of these handicapped children to bring complaints and seek remedies on their behalf." Mem. Op. at 15. In other words, the court agreed with School City that only parents, guardians, and surrogate parents have standing to raise the administrative and judicial procedures enumerated in IDEA. The court concluded that FCC clearly is not a parent or guardian of the children. *Id.* at 17. Moreover, because the term *surrogate* has a particularized meaning in the context of IDEA, the court opined that FCC lacks standing on that basis as well. *Id.* at 19. Finally, the court rejected FCC's third-party standing argument because "FCC is not asserting that it wishes to represent the rights of the designated parents of the handicapped children in its facility; it wishes to stand in the place of the parents." *Id.* at 20-21.

Briefly stated, the parties' positions are as follows: FCC argues that it should be accorded third-party standing to assert the children's rights under IDEA because "those parties that Congress explicitly accorded standing to—parents, guardians, and surrogate parents—are [ ] not in a position" to do so. FCC maintains that the statutory purpose of safeguarding the children's right to a free appropriate public education would be frustrated if it is barred from federal court in this case. FCC also contends that both the constitutional and prudential requirements for third-party standing are satisfied in this case.

School City responds that the express language of the statute permits only three categories of individuals to raise the children's rights under IDEA. Furthermore, the statutory language, implementing regulations, and legislative history give no affirmative indication that Congress intended to grant standing to any additional parties. Most notably, School City directs us to legislative history demonstrating that Congress expressly considered and rejected

a provision requiring states to allow any individual to complain to the state educational agency on behalf of the children. In sum, School City asks us to affirm the district court's judgment because Congress did not intend for parties such as FCC to have a private cause of action under the IDEA.

II.

We review the grant of a motion to dismiss a complaint for lack of subject matter jurisdiction *de novo*. *Underwood v. Venango River Corp.*, 995 F.2d 677, 679 (7th Cir. 1993). The only issue presented here, whether FCC has standing to assert claims under the IDEA, is a threshold matter because putative plaintiffs lacking standing are not entitled to have their claims litigated in federal courts. *Warth v. Seldin*, 422 U.S. 490, 498 (1975); *Freedom From Religion Foundation, Inc. v. Zielke*, 845 F.2d 1463, 1467 (7th Cir. 1988). An analysis of a litigant's standing focuses not on the claim itself, but on the party who is bringing the challenge.[3] *Zielke*, 845 F.2d at 1467. The Supreme Court has directed us to resolve questions of standing according to a two-part inquiry that considers "both constitutional limitations of federal-court jurisdiction and prudential limitations in its exercise." *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979) (quoting *Warth*, 422 U.S. at 498 (1975)). In both dimensions—Article III and prudential—the test for standing "is founded in concern about the proper—and properly limited—role of the courts in a democratic society." *Id.* Ordinarily, "a litigant seeking relief in federal court must satisfy *both* constitutional and

[3] Questions of standing deal exclusively with whether the plaintiff alleged facts satisfying the constitutional and prudential limitations of the standing doctrine. Whether the complaint on its merits could survive a summary judgment motion or support a judgment after a full trial is not relevant at this early stage. *South East Lake View, Etc. v. Dept. of Housing*, 685 F.2d 1027, 1034 (7th Cir. 1982).

prudential limitations in order to have standing to sue." *Locals 666 and 780 v. United States Dept. of Labor*, 760 F.2d 141, 143 (7th Cir.) (emphasis in original), *cert. denied*, 474 U.S. 901 (1985).

A.

Under Article III, the federal judicial power extends only to "cases" or "controversies." The constitutional limitation on standing eliminates cases in which a plaintiff can demonstrate no "case or controversy" between himself and the defendant. *Crosetto v. State Bar of Wisconsin*, No. 92-3899, slip op. at 13-14 (7th Cir. Dec. 20, 1993); *Gorski v. Troy*, 929 F.2d 1183, 1186 (7th Cir. 1991). To satisfy Article III, a plaintiff must allege: (1) an immediate threat of injury; (2) fairly traceable to the defendant's conduct; that (3) a favorable federal court decision likely would redress or remedy. *Lujan v. Defenders of Wildlife*, 112 S.Ct. 2130, 2136 (1992); *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471-472 (1982); *Harris v. City of Zion*, 927 F.2d 1401, 1405 (7th Cir. 1991), *cert. denied*, 112 S.Ct. 3025 (1992) (citations omitted). The party invoking federal jurisdiction has the burden of establishing these elements, but at the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice. *Lujan*, 112 S.Ct. at 2136-2137.

As this court has noted, the Article III standing requirements are rather "undemanding." *North Shore Gas Co. v. E.P.A.*, 930 F.2d 1239, 1242 (7th Cir. 1991). The first prong probes for an "actual or imminent" injury that is "concrete and particularized" to the party asserting the claim. *Lujan*, 112 S.Ct. at 2136. In other words, the plaintiff must have an actual stake in the outcome that goes beyond "intellectual or academic curiosity." *South East Lake View*, 685 F.2d at 1033. Provided the plaintiff has thus established his or her *bona fides*, even a minor or non-economic injury will satisfy the strictures of Article III, though purely psychological harm will not. *Zielke*, 845

F.2d at 1467. In addition, the plaintiff need not show absolutely that a favorable judgment would redress his injury; a "probabilistic benefit from winning a suit" is adequate. *North Shore Gas*, 930 F.2d at 1242.

School City does not appear to challenge FCC's contention that FCC meets the Article III standing requirements. Nevertheless, because standing is a jurisdictional matter, we consider the sufficiency of FCC's allegations. *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986). FCC contends that School City's refusal to pay rent or expenses associated with the education of the children with disabilities, both at FCC's campus and in the group homes, constitutes an injury to it directly traceable to School City's conduct. According to FCC, School City has an obligation under the IDEA either to reimburse FCC for the cost of educating the children or to educate the children themselves. Because School City has done neither, FCC has been deprived of the rental value of its facilities while absorbing the costs of wear and tear on the premises. FCC further submits that a court order requiring School City to comply with IDEA's mandate that the children receive a "free and appropriate public education" by providing classrooms and other facilities and financially supporting the group home concept would redress FCC's injury.

Accepting as true all facts alleged in the well-pleaded complaint and drawing all reasonable inferences in favor of the plaintiff, as we must, *Sherman v. Four County Counseling Center*, 987 F.2d 397, 399 (7th Cir. 1993), we agree that FCC fulfills the Article III standing requirements. Briefly put, FCC argues that School City's denial of the children's rights under IDEA has deprived it of money to which it otherwise would have been entitled. In this respect, FCC's claim parallels that of the plaintiffs seeking third-party standing in *Amato v. Wilentz*, 952 F.2d 742 (3d Cir. 1991). In that case Essex County, New Jersey, sued New Jersey Supreme Court Chief Justice Robert Wilentz because the latter refused to permit Warner Brothers to film a scene for the movie "Bonfire of the

Vanities" in the County Courthouse. The County alleged that Chief Justice Wilentz violated Warner Brothers' First Amendment rights and caused the County to lose $250,000 in revenue. The district court entered judgment for the County, *Amato v. Wilentz*, 753 F. Supp. 543 (D.N.J. 1990). On appeal, the Third Circuit found that the County had satisfied the Article III standing requirements on the basis of the following "pithy" argument by plaintiff's counsel:

> If Warner Brothers had not been deprived of its First Amendment right to make this picture or scenes therefrom in the Old Essex County Courthouse, the county treasury would have been enriched by something in excess of a quarter of a million dollars. That is our standing. We want the money.

952 F.2d 742, 747 n.5 (3d Cir. 1991).[4] In a similar vein, FCC argues that if the children had not been deprived of their rights under IDEA, FCC would have been enriched either through rent payments from School City or by virtue of reduced wear and tear on its facilities. As summarized here, FCC's allegations demonstrate "distinct and palpable" harm, *Warth*, 422 U.S. at 501, fairly traceable to School City's conduct that a favorable ruling on the merits likely would redress. We therefore conclude that FCC meets Article III minima for standing.

B.

Even if a party satisfies the Article III criteria, there are several judicially self-imposed limits on the exercise of federal jurisdiction that may preclude a litigant's standing, including:

> the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed

[4] The Third Circuit nevertheless vacated that judgment on the ground that the County did not satisfy the prudential rules for third-party standing.

> in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked.

Allen v. Wright, 468 U.S. 737, 751 (1984). These prudential limitations on standing eliminate cases "where no individual rights would be vindicated" and restrict "access to federal courts to those litigants best suited to assert a particular claim." *Gladstone*, 441 U.S. at 100; *Gorski*, 929 F.2d at 1186. Unlike the Article III barriers to suit, however, Congress may override the prudential limits on standing by statute. *Gladstone*, 441 U.S. at 100; *Warth*, 422 U.S. at 500-501; *North Shore Gas*, 930 F.2d at 1244; *Center for Auto Safety v. N.H.T.S.A.*, 793 F.2d 1322, 1335 (D.C. Cir. 1986); Paul M. Bator, et al., Hart and Wechsler's The Federal Courts and the Federal System 135 (3d ed. 1988). As the Court explained in *Warth*,

> [T]he source of the plaintiff's claim to relief assumes critical importance with respect to the prudential rules of standing that, apart from Art. III's minimum requirements, serve to limit the role of the courts in resolving public disputes. Essentially, the standing question in such cases is whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief. In some circumstances, countervailing considerations may outweigh the concerns underlying the usual reluctance to exert judicial power when the plaintiff's claim to relief rests on the legal rights of third parties. . . . [S]o long as [Article III] is satisfied, persons to whom Congress has granted a right of action, either expressly or by clear implication, may have standing to seek relief on the basis of the legal rights and interests of others. . . .

Warth, 422 U.S. at 500-501; *see also North Shore Gas*, 930 F.2d at 1244 ("Congress can if it wants allow someone injured in fact by the violation of a statute to bring suit to redress the violation . . . even if he wasn't an intended

beneficiary of the statute in the usual sense. . . ."). In fact, Congress frequently has exercised this prerogative, most often in statutes that involve civil rights, consumer issues, or environmental interests. *See Center for Auto Safety*, 793 F.2d at 1336. Where a statute grants standing to the full limits of Article III, courts "lack authority to create prudential barriers to standing" in suits brought under that statute. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372 (1982) (holding that Congress intended standing under § 812 of the Fair Housing Act of 1968 and therefore the sole requirements for standing to sue under § 812 are the Article III minima).

We now examine the IDEA to determine whether the statutory language grants a cause of action to FCC to seek relief on the basis of the children's rights and interests. This court repeatedly has held that, in cases of statutory interpretation, "[o]ur starting point must be the language of the statute." *Gorski*, 929 F.2d at 1187 n.5 (citing *Bethlehem Steel Corp. v. Bush*, 918 F.2d 1323, 1326 (7th Cir. 1990)). If the statute is unambiguous, we must enforce the plain meaning of the language enacted by Congress.

As explained above, *supra* at 5, § 1415 of the IDEA conditions federal assistance upon a state's compliance with the substantive and procedural goals of the Act. *See Andrews v. Ledbetter*, 880 F.2d 1287, 1288 (11th Cir. 1989). Section 1415(b) sets out a number of required procedures, including an opportunity for parents, guardians, or surrogates to examine records and file complaints with state or local education authorities. Significantly, the statutory language expressly states that "the procedures required by this section *shall include, but shall not be limited to*" the mandatory ones summarized above. 20 U.S.C. § 1415(b)(1) (emphasis supplied). Thus, Congress created a procedural minimum below which a state cannot fall if it wishes to retain eligibility for federal assistance. In so doing, Congress gave no indication of forbidding a state from providing greater protection for the rights of the children. By enacting 511 IAC 7-15-4, which permits "any individ-

ual, group of individuals, agency, or organization" to file a complaint alleging the violation of federal laws that apply to special education, like the IDEA, the Indiana legislature has complied fully with the dictates of § 1415(b). In other words, the Indiana legislature has invited FCC to initiate the state administrative process required by § 1415(b) as a condition of federal assistance for the education of Indiana's children with disabilities. And the IDEA clearly authorized Indiana to do so.

The record shows that FCC exhausted its state remedies as an aggrieved party is required to do by subsection (b) before filing suit.[5] Thus, FCC was entitled to proceed under paragraph (2) of § 1415(e). *See* 20 U.S.C. § 1415(e). Paragraph (2) states in relevant part:

> Any party aggrieved by the findings and decision made under subsection (b) of this section who does not have the right to an appeal under subsection (c) of this section, and any party aggrieved by the findings and decision under subsection (c) of this section, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction *or in a district court of the United States without regard to the amount in controversy.*

20 U.S.C. § 1415(e)(2) (emphasis supplied). Again reading the plain language of the statute, it is evident that FCC qualifies as a "party aggrieved by the findings and decision made under subsection (b) of [§ 1415]" by virtue of the enhanced scope of Indiana's process for reviewing complaints about special education programs. Thus, viewing the statute as a whole, *Conroy v. Aniskoff*, 113 S.Ct. 1562,

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[5] Because the hearing required by § 1415(b) was conducted by the State Department of Education (rather than a local or intermediate educational agency) we believe that § 1415(c) was inapplicable to the administrative proceedings at issue here.

1565 (1993), we conclude that by clear implication § 1415 grants a right of action to FCC on behalf of the children with disabilities. *See Warth*, 422 U.S. at 501.

By implicitly granting standing to a broad group of plaintiffs, Congress has removed the rationale for invoking our usual prudential restraints on judicial review. As the D.C. Circuit opined in *Center for Auto Safety*,

> It would make no sense to deny standing under a principle designed to prevent courts from encroaching on the legislature's domain where Congress itself has already 'weighed the need for and the value of judicial review of a given category of administrative decisions, and has decided it is warranted.'

793 F.2d at 1337. FCC, therefore, need not run the gauntlet of prudential standing tests; satisfying Article III is enough.

III.

Following the plain language of § 1415, and reading that statute as a whole, we are convinced that Congress has implicitly granted standing under the IDEA to the limits of Article III. In § 1415, Congress created a flexible scheme to protect the educational rights and interests of children with disabilities. With respect to the boundaries of third-party standing under the IDEA, § 1415 establishes the required procedures in subsection (b) as the floor and Article III as the ceiling. Within that range, Congress has deferred to the judgment of the states and localities. Indiana's procedural scheme, enacted in compliance with § 1415, broadly grants third-party standing to raise complaints alleging violations of the IDEA. Having properly invoked and exhausted available state administrative remedies, FCC then was entitled to bring this action in federal court if it could satisfy the requirements of Article III standing. FCC has standing in the Article III sense on the basis of its allegations of injury in fact, fairly traceable to School City, that a favorable decision on the merits

might redress. Accordingly, we REVERSE the judgment of the district court and REMAND the case for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

FAMILY & CHILDREN'S CENTER, INC.,	)	
Plaintiff,	)	
v.	)	CIVIL NO. 92-327
SCHOOL CITY OF MISHAWAKA,	)	
Defendant.	)	

MEMORANDUM AND ORDER

The complaint was filed in this case on May 29, 1992, by the plaintiff, Family & Children's Center, Inc. (hereafter "FCC") against the School City of Mishawaka (hereafter "School City"). The complaint purports to allege claims under the Education of the Handicapped Act, 20 U.S.C. §1400 et seq., and also attempts to assert pendant state law claims. Since there is no possible basis for jurisdiction here under 28 U.S.C. §1332, this court must consider the case at least preliminarily as one attempting to invoke the federal question jurisdiction of this court. The plaintiff, FCC, Inc., is a not for profit corporation organized and existing under the laws of the State of Indiana with its principal place of business and activity in Mishawaka, Indiana. It is a state licensed, private child care facility and all of its relevant facilities are located in Mishawaka, Indiana. At any given time, the FCC may have approximately 110 children classified as emotionally handicapped, many of whom are placed with FCC by an order of a state court in the State of Indiana, generally in St. Joseph County, Indiana, having appropriate jurisdiction. The legal custody of these children remains with either the courts, placing agency, or the parents under the laws of Indiana. Additionally, the FCC operates two group homes in South Bend, Indiana, where a total of 17 handicapped children are housed at any one time. Between 1982 and 1990, FCC provided educational services directly to its students which was funded through an instructional services agreement entered into between FCC and the School

City by which the School City elected to transfer tuition from various placing counties and then transmitted those funds to the FCC less an administrative charge for the expense of collecting such funds. In 1989, FCC decided that the School City should educate all of the children at the FCC located in Mishawaka. Apparently, that decision did not relate to children that may have been then located in South Bend, Indiana. In fact the education of the children located in South Bend, Indiana, appears to have been a sore point in these negotiations, because the School City declined to be responsible for educating children located in the South Bend group homes as the School City opined that these students were not its legal responsibility, but would be the legal responsibility of the South Bend Community schools. The School City also refused FCC's demands that it construct or lease a new facility on FCC's grounds to educate the children or that the School City lease FCC's existing facilities.

Apparently, or purportedly, under the provisions of the Individuals With Disabilities Education Act, ("IDEA"), 20 U.S.C. §1400 et seq., formally known as the Education of the Handicapped Act, on September 17, 1991, FCC filed a petition with the Indiana Department of Education seeking an order requiring the School City to educate those handicapped children periodically housed in FCC's South Bend group homes, to provide a summer instructional program for the handicapped children, to reimburse FCC for the expense incurred in educating handicapped children and to require School City to either provide its own facilities to educate the handicapped children, or to reimburse FCC for the city's use of its facilities in educating the handicapped children.

20 U.S.C. §1415(b) requires states to provide parents or guardians with an opportunity to present complaints regarding a school's educational decision with respect to handicapped children through an impartial administrative process. In Indiana that process is found at 511 IAC 7-1-7. This court has had some experience with parts of that process as reflected in Howey v. Tippecanoe Sch. Corp., 734 F.Supp. 1485 (N.D.Ind. 1990).

In precise legal terms, FCC is not strictly speaking the "parent" or "guardian" of any of these children. FCC raises a difficult but important issue of standing based on those salient facts. Indiana has a regulatory scheme which is broader in scope and permits any individual group of

individuals, agency or organization to file a complaint alleging violation of federal or state laws that apply to special education programs. See 511 IAC 7-15-4:

> (a) Any individual, group of individuals, agency, or organization may file a complaint alleging violations of federal or state laws that apply to special education programs. The complaint shall:
>
> (1) be in writing;
>
> (2) indicate the allegations of the technical violation and the circumstances on which the allegations are based;
>
> (3) be signed by the complainant; and
>
> (4) be submitted to the division of special education.
>
> (b) The division of special education shall develop and implement written procedures to investigate complaints. These procedures shall be available upon request and shall include the following:
>
> (1) A system to follow when complaints are received by the division of special education office including the following:
>
> (A) Determination of the issues.
>
> (B) Assignment of an individual to investigate and monitor compliance.
>
> (2) The time lines issuance compliance.
>
> (c) The individuals asigned as complaint investigators shall be trained employees employees of the department of education, or other state agencies, as appropriate.
>
> (d) The investigation of a complaint may involve off-site and on-site investigation procedures. The complaint investigator shall have the following responsibilities:
>
> (1) Contacting the complainant and the public agency named in the complaint to clarify the issues, if necessary.
>
> (2) Determining what investigation procedures will be necessary and notifying both parties regarding those procedures.

(3) Conducting the investigation.

(4) Filing a written response with following:

(A) The complainant.

(B) The superintendent or chief executive officer of the public agency involved.

(C) The special education program administrator of the special education planning district involved.

(D) The director of the division of special education.

(E) The designated administrator of the state agency responsible for the administration and operation of the state agency programs, if appropriate.

(5) Facilitating, or providing for, negotiations between the parties, if necessary.

(6) Providing technical assistance to assist in achieving compliance.

(e) The final written response of the complaint investigator shall be filed within thirty (30) calendar days of the date the written complaint is received. An extension of time may be granted by the director of the division of special education only if exceptional circumstances exist with respect to a specific complaint. In that event, all parties shall be notified in writing of the extension and the reasons for it.

(f) Orders issued by the complaint investigator shall be binding on the public agency unless appealed by the public agency. The time lines for the public agency to submit a corrective action plan and to achieve compliance shall be included in the complaint investigator's report. Compliance with orders issued by the complaint investigator shall be monitored by the division of special education.

(g) Failure of the public agency to achieve compliance with orders issued by a complaint investigator shall result in the withholding of federal and state funds to the public agency.

(h) Either the public agency or the complainant may request reconsideration by the director of the division of special education of any part of a complaint report. A request for reconsideration must be filed within fifteen (15) calendar days of the date the complaint report is received by the public agency and the complainant. The request for reconsideration shall:

(1) be sent to the director of the division of special education;

(2) be in writing, with a copy sent to the other party; and

(3) state the specific portions of the report the party believes should be reconsidered with specific reasons to support the request.

(i) Reconsideration of a complaint report shall be conducted by the director of the division of special education. Written notice of the result of that reconsideration shall be issued within fifteen (15) calendar days of the date the request for reconsideration is received by the director of the division of special education.

(j) Any party disagreeing with the result of the reconsideration by the director of the division of special education may appeal to the Secretary of the United States Department of Education. Either party disagreeing with the decision of the Secretary of Education may appeal to a civil court with jurisdiction.

511 IAC 7-15-5 (Supp. 1993).

When the aforesaid petition was filed with the Indiana Department of Education (hereafter "IDOE") on September 17, 1991, that state educational agency determined on its own initiative to address FCC's complaint in a two-part manner. The first step was to conduct an investigation through IDOE's division of special education of alleged S-1 rule violations. Rule S-1 is formally cited as 511 IAC 7-1-7. With respect to other alleged violations of state and federal law, IDOE indicated that those issues would be addressed by way of a hearing before an IDOE hearing officer and further indicated that the complaint

investigation would proceed first and that the hearing portion of the administrative proceeding would not commence until the S-1 investigation had been concluded. Apparently, FCC objected to this management approach and asked IDOE to reinstate the issue so it could address the failure of the School City to provide necessary facilities and equipment for the education of the handicapped children or to reimburse FCC for the use of its facilities and demanded that IDOE also address the issue of the failure of the School City to reimburse FCC for its expenses in educating the handicapped children for the 1990-1991 school year and for the 1991 summer school session. IDOE declined this invitation to rearrange its approach to the resolution of the issues presented to it.

The investigation went forward and on December 9, 1991, the commission entered its finding of fact and conclusions of law and order finding against FCC. It is correct that 20 U.S.C. §1415(c) requires that states provide an appeal process for the hearing officer's determination to the "state educational agency" which is provided for in 511 IAC 7-1-7, which provides that a complaint may be appealed to the commission on general education. The FCC requested reconsideration which was denied. The matter was referred back to a hearing officer and on April 20, 1992, the School City moved to dismiss the remaining claims asserting that the hearing officer was without jurisdiction to hear the remaining issues because FCC lacked the necessary standing. The hearing officer issued an order dismissing the remaining claims based on lack of jurisdiction on May 15, 1992.

An additional provision in 511 IAC 7-15-4(j) provides that a final decision of a state educational agency may be appealed to the Secretary of Education of the United States. On January 27, 1992, FCC appealed the aforesaid findings of the S-1 investigation to that federal agency and secretary. On July 22, 1992, the United States Department of Education refused to hear that appeal. Thereafter on May 29, 1992, this action was filed purporting to be under 20 U.S.C. §1415(e), which provides:

e) Civil action; jurisdiction

(1) A decision made in a hearing conducted pursuant to paragraph (2) of subsection (b) of this section shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (c) and paragraph (2) of this subsection. A decision made under subsection (c) of this section shall be final, except that any party may bring an action under paragraph (2) of this subsection.

(2) Any party aggrieved by the findings and decision made under subsection (b) of this section who does not have the right to an appeal under subsection (c) of this section, and any party aggrieved by the findings and decision under subsection (c) of this section, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

(3) During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

(4) (A) The district courts of the United States shall have jurisdiction of actions brought under this subsection without regard to the amount in controversy.

(B) In any action or proceeding brought under this subsection, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the

parents or guardian of a handicapped child or youth who is the prevailing party.

(C) For the purpose of this subsection, fees awarded under this subsection shall be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished. No bonus or multiplier may be used in calculating the fees awarded under this section.

(D) No award of attorneys' fees and related costs may be made in any action or proceeding under this subsection for services performed or subsequent to the time of a written offer of settlement to a parent or guardian, if

(i) the offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, in the case of an administrative proceeding, at any time more than ten days before the proceeding begins;

(ii) the offer is not accepted within ten days; and

(iii) the court or administrative officer finds that the relief finally obtained by the parents or guardian is not more favorable to the parents or guardian than the offer of settlement.

(E) Notwithstanding the provisions of subparagraph (D), an award of attorneys' fees and related costs may be made to a parent or guardian who is the prevailing party and who was substantially justified in rejecting the settlement offer.

(F) Whenever the court finds that

(i) the parent or guardian, during the course of the action or proceeding, unreasonably protracted the final resolution of the controversy;

(ii) the amount of the attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community for

> similar services by attorneys of reasonably comparable skill, experience, and reputation; or (iii) the time spent and legal services furnished were excessive considering the nature of the action or proceeding,the court shall reduce, accordingly, the amount of the attorneys' fees awarded under this subsection.
>
> (G) The provisions of subparagraph (F) shall not apply in any action or proceeding if the court finds that the State or local educational agency unreasonably protracted the final resolution of the action or proceeding or there was a violation of this section.

20 U.S.C. §1415(e) (1982).

In that complaint, FCC brings two claims under IDEA and one state law breach of contract claim apparently attempting to invoke this court's ancillary jurisdiction. The School City has moved to dismiss the IDEA claims because of the lack of standing to assert those claims and requests the court to grant that dismissal and then refrain from exercising ancillary jurisdiction to hear the state law claims.

The School City's motion to dismiss is filed under Rule 12(b)(1) of the Federal Rules of Civil Procedure (Fed.R.Civ.P.). It needs to be emphasized that this motion to dismiss is not under Rule 12(b)(6), Fed.R.Civ.P. There is a well-developed body of law with regard to a Rule 12(b)(1) determination as reflected in Bowyer v. U.S. Dep't of Air Force, 875 F.2d 632 (7th Cir. 1989), and an opinion by Judge Miller in this court in Operative Plasterers and Cement Masons Int'l Ass'n v. Benjamin, 776 F.Supp. 1360, 1362 (N.D.Ind. 1991). See also Bellock v. Orkin Exterminating Co. Inc., 754 F.Supp. 122 (N.D.Ill. 1990). Hearing and oral argument were had in open court on March 15, 1993. It was there disclose that a partially parallel state court case is being prosecuted involving the factual setting of this case.

The IDEA is certainly a comprehensive scheme created by the Congress of the United States, the provisions of which cut across many of the traditional boundaries of state-federal relationships and funding. One of the fundamental values involved in the statute was the providing

of a free appropriate public education to handicapped children. Also, elaborate procedural safeguards were a part of the condition precedent to the providing of federal funds. See Hendrick Hudson Central Dist. Bd. of Educ. v. Rowley, 458 U.S. 176 (1982). Of particular moment here are the provisions of 20 U.S.C. §1415(b) and (c) as follows:

> **(b) Required procedures; hearing**
> (1) The procedures required by this section shall include, but shall not be limited to-
>
> (A) an opportunity for the parents or guardian of a handicapped child to examine all relevant records with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child;
> (B) procedures to protect the rights of the child whenever the parents or guardian of the child are not known, unavailable, or the child is a ward of the State, including the assignment of an individual (who shall not be an employee of the State educational agency, local educational agency, or intermediate educational unit involved in the education or care of the child) to act as surrogate for the parents or guardian;
> (C) written prior notice to the parents or guardian of the child whenever such agency or unit-
>
> (i) proposes to initiate or change, or
> (ii) refuses to initiate or change,
>
> the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child;
> (D) procedures designed to assure that the notice required by clause (C) fully informs the parents or guardian, in the parents' or guardian's native language, unless it clearly is not feasible to do so, of all the procedures available pursuant to this section; and

(E) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.

(2) Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child.

(c) Review of local decision by State educational agency

If the hearing required in paragraph (2) of subsection (b) of this section is conducted by a local educational agency or an intermediate educational unit, any party aggrieved by the findings and decision rendered in such a hearing may appeal to the State educational agency which shall conduct an impartial review of such hearing. The officer conducting such review shall make an independent decision upon completion of such review.

20 U.S.C. §1415 (1982).

The standard for review contained in 20 U.S.C. 1415(e)(2) was the subject of an extensive judicial examination in Doyle v. Arlington County School Board, 953 F.2d 100 (4th Cir. 1991), where Judge Widener speaking for that court stated:

> Next, we must determine what level of deference should be given to the administrative findings. Generally, in reviewing state decisions in IDEA cases, courts are required to make an independent decision based on a preponderance of the evidence, while giving due weight to state administrative proceedings. Hendrick Hudson Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 206, 102 S.Ct. 3034, 3050, 73 L.Ed. 2d 690 (1982); Spielberg v. Heeeenrico County Pub. Sch., 853 F.2d 256, 258 (4th Cir. 1988) cert. denied, 489 U.S. 1016, 109 S.Ct. 1131, 103

> L.Ed.2d 192 (1989); Burke County Board of Educ. v. Denton, 895 F.2d 973, 981 (4th Cir. 1990) (The reviewing court 'makes a bounded, independent decision-'bounded by the administrative record and additional evidence, and independent by virtue of being based on a preponderance of the evidence before the court.'') (quoting Town of Burlington v. Massachusetts Dep't of Educ., 736 F.2d 773, 791 (1st Cir. 1984), aff'd sub nom. Burlington School Comm. v. Massachusetts Dep't of Educ., 471 U.S. 359, 105 S.Ct. 1996, 85 L.Ed.2d 587 (1985).
>
> * * *
>
> With this system for judicial and administrative review in mind, the question is how we apply the due weight requirement of Rowley. ... More in line with the view of the District of Columbia Circuit, we think that the findings of fact by the hearing officers in cases such as these are entitled to be considered prima facia correct, akin to the traditional sense of permitting a result to be based upon such fact finding, but not requiring it. See New York Transit Authority v. Beazer, 440 U.S. 568, 587 n. 31, 99 S.Ct 1355, 1366 n. 31, 59 L.Ed.2d 587 (1979). We are further of the opinion that when fact findings are regularly made and entitled to prima facie correctness, the district court, if it is not going to follow them, is required to explain why it does not. This holding is consistent with Town of Burlington, 736 F.2d at 792 and Kerkam, 862 F.2d at 889. After giving the administrative fact-findings such due weight, if any, the district court then is free to decide the case on the preponderance of the evidence, as required by statute.

Doyle, 953 F.2d at 103-04.

Certainly, under Rule 12(b)(1), Fed.R.Civ.P., administrative fact findings are entitled to "due weight." The standard of review in this context appears to have been decided in this circuit by Lachman v. Ill. State Bd. of Educ., 852 F.2d 290 (7th Cir. 1988), where the court stated:

> It is well established that in reviewing the outcomes reached through 1415(b) and (c), administrative appeals procedure, a district court is to make an independent decision as to whether the requirements of the act have been satisfied. That decision is to be based on a preponderance of the evidence, giving due weight to the results of those state administrative proceedings.

Lachman, 852 F.2d at 293.

Returning to the plaintiff's complaint more specifically, it is alleged in Count I that the actions of the School City have deprived the handicapped children of a free appropriate public education and are unlawful and discriminatory. In Count II, it is alleged that the School City has failed to meet its obligation to educate handicapped children by failing to educate the students in the South Bend group homes and construct and/or lease educational facilities on FCC's main campus. Count III alleges that the School City has wrongfully failed and refused to provide for the education of those handicapped children under FCC's care and control who are periodically housed at FCC's two group homes. And, finally, Count IV alleges that the School City has failed to reimburse it for the use of its facilities to educate the handicapped children in violation of the IDOE and its attendant state regulations.

This Supreme Court and its immediate predecessors have been greatly concerned with the concept of standing. See International Primate Protection League v. Tulane, 500 U.S. --, 111 S.Ct. 1700 (1991). See also such cases as Flast v. Cohen, 392 U.S. 83 (1968). There is a wide variety of settings in which the standing arguments arise and the nature of those settings may well determine the outcome of the particular decision regarding standing. Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464 (1982), Singleton v. Wulff, 428 U.S. 106 (1976), and Warth v. Seldon, 422 U.S. 490 (1975), are all examples but are not particularized to the setting in this case. This court is all too well aware of the teaching of Justice McReynolds in Pierce v. Society of Sisters, 268 U.S. 510 (1925), which established the basic constitutional right for parents to educate their children in non-public schools. However, with all deference, that teaching does not help the plaintiffs here. Neither does

Secretary of State of Md. v. Joseph H. Munson Co. Inc., 467 U.S. 947 (1984), nor Barrows v. Jackson, 346 U.S. 249 (1953). The same needs to be said for Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980).

The two cases cited by the plaintiff from this circuit still are not particularized enough to answer the standing question. Those cases are Oddi v. Ayco Corp., 947 F.2d 257 (7th Cir. 1991), and Rothner v. City of Chicago, 929 F.2d 297 (7th Cir. 1991).

The history of this concept is elaborately set forth in this circuit by Judge Ripple in Frank Rosenberg, Inc. v. Tazewell County, 882 F.2d 1165 (7th Cir. 1989). Standing must be examined under IDEA which was the case in Hendrick, supra. One way to state the question here is whether FCC can, under IDEA, become surrogate parents or guardians of these handicapped children to bring complaints and seek remedies on their behalf. There can be no doubt that one of the legislative values that is reflected in §1415 of IDEA is the involvement of parents or guardians.

Other courts have wrestled with this standing problem. For example, Judge McCalla, acting in United States v. Tenn., 798 F.Supp. 483, 488 (W.D. Tenn. 1992), recently opined, "Only parents, guardians and surrogate parents are required and entitled to utilize the administrative procedures set out in IDEA."

There are state court decisions also dealing with the subject matter. One is in Illinois. In Juneau Academy v. Chicago Bd. of Educ., 461 N.E.2d 597 (Ill.App. 1984), the trial court dismissed for lack of standing a suit brought by a private residential care facility under IDEA. The plaintiff, Juneau Academy, was a private special educational facility which filed a complaint against the Chicago Board of Education under the IDEA, seeking to recover payment for services rendered to handicapped students which the Chicago Board of Education had placed in Juneau. Juneau presented both IDEA claims as well as state law contract claims. The Appellate Court of Illinois, referring to state procedures in that state, held that a private educational facility such as Juneau lacks standing to assert the rights of handicapped children to a

free education. The court ruled that Juneau could not rely on students' rights under federal law to advance its contract case.

In a slightly different although not totally dissimilar context, in Andrews v. Ledbetter, 880 F.2d 1287 (11th Cir. 1989), it was held that local educational agencies lacked standing to file complaints under the IDEA since they were not "parents or guardians." The Eleventh Circuit focused on the IDEA's requirement of parental involvement. See also Seneca Falls Central Sch. Dist. v. Liverpool Central Sch. Dist., 728 F.Supp. 910 (W.D.N.Y. 1990), Allstate Insurance Co. v. Bethlehem Area School District, 678 F.Supp. 1132 (E.D.Pa. 1983), Gehman v. Prudential Property & Casualty Co., 702 F.Supp. 1192 (E.D.Pa. 1989). Also in Susan R.M. v. Northeast Indep. Sch. Dist., 818 F.2d 455 (5th Cir. 1987), even a non-custodial father lacks standing to bring a suit under IDEA. There is a fairly good bundle of federal authority that holds that the words parent or guardian of the disabled children are to be interpreted literally. That appears to be the teaching of Alexopulos v. San Francisco Unified Sch. Dist., 817 F.2d 551 (9th Cir. 1987). However, the Ninth Circuit in that case appeared to provide a safety valve when it said:

> When no parent or guardian can be identified, the local public agency must assign a surrogate parent to pursue the child's rights. Procedural protections afforded by the EHA are also conferred on parents or guardian or designated surrogate.

Alexopulos, 817 F.2d at 556.

The question that challenges this court in this record is not the question of whether FCC is a parent or a guardian. It clearly is not. But there is an additional question as to whether it may arguably be a surrogate parent or a designated surrogate. The concept of surrogate parents was also referred to recently in United States v. Tenn., 798 F.Supp. 483 (W.D.Tn. 1992). See also Garrity v. Gallen, 522 F.Supp. 171 (D.NH. 1981).

The court must give careful attention to 34 C.F.R. 300.514, which states:

> (a) General. Each public agency shall insure that the rights of a child are protected when:

(1) No parent (as defined in 300.10) can be identified;

(2) The public agency, after reasonable efforts, cannot discover the whereabouts of a parent; or

(3) The child is a ward of the State under the laws of that State.

(b) Duty of public agency. The duty of a public agency under paragraph (a) of this section includes the assignment of an individual to act as a surrogate for the parents. This must include a method (1) for determining whether a child needs a surrogate parent, and (2) for assigning a surrogate parent to the child.

(c) Criteria for selection of surrogates. (1) The public agency may select a surrogate parent in any way permitted under State law.

(2) Public agencies shall insure that a person selected ~_ ~ surrogate:

(i) Has no interest that conflicts with the interest of the child he or she represents; and

(ii) Has knowledge and skills, that insure adequate representation of the child.

(d) Non-employee requirement; compensation. (1) A person assigned as a surrogate may not be an employee of a public agency which is involved in the education or care of the child.

(2) A person who otherwise qualifies to be a surrogate parent under paragraphs (c) and (d)(1) of this section, is not an employee of the agency solely because he or she is paid by the agency to serve as a surrogate parent.

(e) Responsibilities. The surrogate parent may represent the child in all matters relating to:

(1) The identification, evaluation, and educational placement of the child, and

(2) The provision of a free appropriate public education to the child.

34 C.F.R. 300.514 (1992).

Indiana law states, "As used in this chapter, 'parent' means the individual who has legal custody of the child." 20 Ind. Code Ann. 1-1.8-8 (Supp. 1992). The Indiana implementing regulations define 'parent:'

> Parent means:
>
> (1) any natural or adoptive parent whose natural parental rights have not been terminated or restricted in accordance with law, and:
>
> (2) a legal guardian, including a court appointed temporary guardian or a person with legal custody such as a grandparent or other relative, or other adult who accepts full legal responsibility for the student and with whom the student lives;
>
> (3) an educational surrogate parent appointed in accordance with 511 IAC 7-9-1;
>
> (4) a foster parent with whom the student is living and who is acting as a parent as long as the foster parent has received training as an educational surrogate parent in accordance with this article; and
>
> (5) any student with disabilities who is eighteen (18) years old and has not been adjudicated incompetent by a court, who shares this designation with the student's parent.

511 IAC 7-3-39.

With regard to the 216 children placed in the care and custody of FCC, 104 were referred to FCC by the School City for special education services and of those 104, 101 had "surrogate parents" appointed for them and it apparently was unnecessary to do so for three others. These surrogate parents were involved in the creation and implementation of special education programs for the children. In no formal sense can it be said that FCC is a surrogate parent since that concept has a particularized meaning and involves particularized procedures. No question that a surrogate may have standing to raise a disabled child's right to a free and appropriate education under IDEA. See Lunceford v. Dist. of Columbia Bd. of Educ., 745 F.2d 1577 (D.C.Cir. 1984).

The plaintiff has argued that even if the FCC lacks standing under IDEA, standing should be granted under the jus tertii doctrine, relying on Arons v. N.J. State Bd. of Educ., 1987 WL 10808 (D.N.J.). In Arons, the plaintiff had founded an advocacy group, through which she assisted parents of handicapped children in administrative hearings as a lay advocate. Arons filed suit in a United States District Court, alleging that the administration of the New Jersey special education should be read to allow compensation of lay advocates. Arons at 1. The district court found it lacked jurisdiction to hear the plaintiff's claims. FCC argues that this court should grant it standing to bring suit on behalf of the handicapped children in its facility based on the reasoning in a footnote in Arons:

> By Opinion and Order dated November 5, 1986, this court concluded that plaintiff had standing to assert the rights of parents of handicapped children under the jus tertii doctrine. The court based its determination upon a finding that plaintiff, in her advocacy work, has the sort of confidential relationship to the parents of handicapped children contemplated in Griswold v. Connecticut, 381 U.S. 479, 481 (1965) and Eisenstadt v Baird, 405 U.S. 438, 444 (1972).

Arons at 9, n. 1.

Arons does not support the FCC's argument for standing, however, as this case involves the FCC's demand to be considered, at a minimum, the surrogate parents of the handicapped children. The court in Arons merely determined that a lay advocate had standing to assert the rights of the parents of handicapped children, which is an entirely different matter. The lay advocates discussed in Arons assist without compensation, under the supervision of an agency, and all children are represented by a parent. This situation is not analogous to the one before this court. The FCC is not asserting that it wishes to represent the rights of the designated parents of the handicapped children in its facility; it wishes to stand in the place of the parents.

It is not for this court to re-write the federal statute, its regulations or the appropriate statutes of regulations of the State of Indiana. The plaintiff here in response to the aforesaid motion to dismiss has attempted

to build a massive record basically dealing with the underlying merits, although, to be fair, the plaintiff has made an argument with regard to standing. This court, however, does not find same to have merit. The defendant's motion to dismiss is granted. Costs are assessed against the plaintiff. Judgment shall enter accordingly. **It is so ordered.**

DATED: March 19, 1993

/s/

Allen Sharp
CHIEF JUDGE
UNITED STATES DISTRICT COURT

Indiana Department of Education
Center for Community Relations and Special Populations
Division of Special Education

December 9, 1991

Dr. Stella Batagiannis, Superintendent
School City of Mishawaka
1402 South Main Street
Mishawaka, Indiana 46544-5297

Dear Superintendent Batagiannis:

RE: Complaint #611-91

This letter is to inform you of the Findings of Fact, Conclusions of Law, and Orders regarding the complaint filed by Mr. Douglas D. Small, Esq. of Barnes and Thornburg, legal counsel for Family and Children's Center, Incorporated, regarding allegations of Rule S-1 violations by the School City of Mishawaka. I am forwarding a copy of this report to the complainant and others as listed below.

Introduction:

On September 17, 1991, the Family and Children's Center, Incorporated, through their legal counsel, Douglas D. Small, Esq. of Barnes and Thornburg, petitioned the State Board of Education for a determination of certain rights with regard to the School City of Mishawaka.

Upon review of the petition by the State Board Liaison and the Legal Section of the Department of Education, it was determined that certain issues needed to be investigated to precede and assist the State Board of Education in the matter of the petition. Subsequently, the issues pertinent to the State Board of Education actions were identified and the matter

referred to the Division of Special Education. An Indiana Department of Education complaint investigator, Robert J. Robertson, was assigned to investigate the complaint. This letter serves to apprise you of the following issues which were investigated through the complaint process. The specific issues were:

1. Whether the School City of Mishawaka has made special education and related services available to eligible disabled children at Family and Children's Center during the 1990-91 and 1991-92 school years;
2. Whether the School City of Mishawaka employed proper procedures for determining placements and developing educational programs (related services included) for eligible disabled children at Family and Children's Center;
3. Whether the School City of Mishawaka improperly received State and/or Federal money for the education of eligible disabled children at Family and Children's Center;
4. Whether the School City of Mishawaka is in violation of its comprehensive plan and its local policies and procedures with respect to identification, evaluation, placement, and the provision of a free appropriate public education to eligible disabled children at Family and Children's Center;
5. Whether the School City of Mishawaka failed to advise eligible disabled children at Family and Children's Center (or the children's parents or guardians) of all procedural safeguards and their due process rights; and
6. Whether the School City of Mishawaka developed and implemented policies and procedures for determining, on an individual basis, whether or not an eligible disabled child at Family and Children's Center requires an extended school year.

In the process of this investigation, the investigator reviewed numerous legal documents that had been prepared by Douglas D. Small, legal counsel for the Family Children's Center; interviewed (during sworn testimony arranged by Family and Children's Center's legal counsel) Mr. Chad Miller, Director of Educational Liaison Services and Recreation, Family and Children's Center; Ms. Sylvia Sebert, Chief Operating Officer, Family

and Children's Center; Mr. John T. Phair, President, Children's Campus Board; and Mr. Joseph T. Barkman, Executive Vice President and Chief Financial Officer, Family and Children's Center. The investigator also interviewed Ms. Pamela von Rahl, Director of Special Education, School City of Mishawaka; Mr. Terry Grass, Principal of School City of Mishawaka's school program on the grounds of Family and Children's Center; and Dr. Stella Batagiannis, Superintendent for School City of Mishawaka. The investigator also reviewed 216 student-specific questionnaires completed by Ms. Sylvia Sebert and 104 student-specific questionnaires completed by Ms. Pam von Rahl. The investigator also reviewed a general questionnaire completed by Mr. Joseph T. Barkman and Ms. Sylvia Sebert. The investigator also reviewed School City of Mishawaka's written policies pertaining to non-public school children and reviewed an October 30, 1991 letter from Ms. Pamela von Rahl.

Findings of Fact:

Based upon the interviews conducted and review of the documentation submitted to this investigator, the following Findings of Fact are made:

1. It is the policy of School City of Mishawaka that they "**shall make available special education and related services designed to meet the needs of non-public school handicapped children residing in the jurisdiction of the school.**" The comprehensive plan School City of Mishawaka submitted to the Indiana Department of Education in August of 1991 does not list Family and Children's Center as a non-public school within the district. According to the Director of Special Education, the omission of the Family and Children's Center was an oversight and she indicated the district fully understands (as evidenced by their practice) that School City of Mishawaka must provide a free appropriate public education to eligible disabled children at Family and Children's Center and children who live in the group home located within the boundaries of School City of Mishawaka.

2. The Family and Children's Center, Inc. is a State-licensed private child care facility. The children's campus and corporate offices are located in Mishawaka, Indiana. At any one time, Family and Children's Center has custody of and cares for approximately 115 children and has a capacity of approximately 130 children. The children reside at Family and Children's Center (or in their group homes) as a result of court order or placement by the Indiana Department of Public Welfare. Since the beginning of the 1990-91 school year, 216 children at the Family and Children's Center have had a fiscal or programmatic relationship with School City of Mishawaka.

3. The Family and Children's Center operates three Group homes (two within the school boundaries of South Bend Community Schools and one within the boundaries of School City of Mishawaka). The group homes are used as transition residences for children requiring less restrictive living environments than the environment provided on the Children's Campus. Since the beginning of the 1990-91 school year, 63 (of 216) different children have resided in these group homes. The Family and Children's Center questionnaire information suggests that the majority of the group home placements are successful and the children continue in the group home placements until they return to their home counties. In many cases, placements in the group homes were for a year or more.

4. During the 1990-91 school year, Family and Children's Center continued to refer selected students to School City of Mishawaka as they had practiced for a number of years. Historically, according to the Director of Special Education, the principal at Family Children's Center referred residents of the group homes in South Bend and Mishawaka to her for possible special education if he suspected the students could be accommodated in a special education program or general education program within the Mishawaka schools. According to checklist information provided by Family Children's Center and School City of Mishawaka, during the 1990-91 school year, School City of Mishawaka served

eleven (11) children in their special education programs in regular school buildings who were residents of the group homes. Five (5) children resided in the group homes in South Band and five (5) children resided in the group homes in Mishawaka. Additionally, one (1) student was a resident of both the South Bend and the Mishawaka group home during the 1990-91 school year.

5. It is presently the position of Family Children's Center that School City of Mishawaka has the responsibility to educate the children who are disabled at Family Children's Center's main campus in Mishawaka and its group homes in South Bend and Mishawaka.

6. School City of Mishawaka maintains that it has a responsibility to educate the children at Family Children's Center's main campus in Mishawaka (and the children in the Mishawaka group home) but maintains that the children in the group homes in South Bend are not their responsibility since the children reside in South Bend.

7. The children residing in the group homes in South Bend are presently educated in South Bend's educational programs and are not served by School City of Mishawaka.

8. In a Brief in Support of Family and Children's Center, Inc.'s Petition for Payment of Tuition and Related Educational Expenses for Handicapped Children, the attorneys for the complainant argue that Indiana law also requires that a party seeking to establish residence show both that they "live in the place in question and that they have intentions to remain there." Since placements in the group homes are for relatively short terms, they argue that the children in the group homes "do not reside in South Bend." They further argue that the frequent transferring back and forth from the School City of Mishawaka to the South Bend Community Schools program creates an undue hardship on the children and that "the intent of the General Assembly to provide a free, appropriate public education is being denied."

9. In 1989, the Family and Children's Center decided (unilaterally determined) that School City of Mishawaka should educate all the children at the Family and Children's Center. A fall 1989 meeting was held between representatives for the Family Children's Center

and the Superintendent of the School City of Mishawaka. In a follow-up letter dated November 10, 1989, to the Superintendent of the School City of Mishawaka, a representative of the Family and Children's Center Board stated, **"The Board of the Family and Children's Center strongly believes the Mishawaka School City should provide guidance and take an active role in the operation of this facility."**

10. According to statements from the President of Family Children's Center and the Chief Operating Officer, in a February 1990 meeting between representatives of Family and Children's Center and School City of Mishawaka and the Superintendent of School City of Mishawaka announced in a meeting with Family Children's Center representatives that School City of Mishawaka was not responsible for and would not educate the children with handicaps who were residents of Family Children's Center.

11. In a letter dated May 22, 1990, the legal counsel for Family and Children's Center indicated to the legal counsel of the School City of Mishawaka that **"Our client would like to begin the education program for these children through School City ... when the 1990-91 school year begins."** The letter indicated that, at that time, there were 74 students who were enrolled in the campus school program with an expectation of 107 students projected for the 1990-91 school year (not including those Family and Children's Center students who presently attend public schools).

12. In a follow-up letter dated June 11, 1990, the legal counsel for Family and Children's Center indicated to the legal counsel of the School City of Mishawaka that **"As the parent of these children as the term is defined in Rule S- 1J, we are concerned that this evaluation process begin immediately."** The letter went on to state: **"Under Section 3 of Rule S-1, these children were referred to Family & Children's Center for an educational evaluation on May 22, 1990 This rule requires prompt action with the deadline set forth therein."**

13. On July 16, 1990, a joint Memorandum of Understanding was signed by the chief administrators of the Family and Children's

Center and the (former) Superintendent of the School City of Mishawaka indicating that School City of Mishawaka would **"assume full responsibility for the education of Family and Children's Center children no later than the beginning of the 1991-92 school year."** The memorandum also stipulated that the School City of Mishawaka would assume full responsibility for the 1991 summer session and, if that did not happen, the School City of Mishawaka would reimburse Family and Children's Center for all costs associated with the summer program. This memorandum had the effect of rescinding the student referrals that had been initiated by Family and Children's Center's legal counsel on May 22, 1990 and June 11, 1990.

14. A joint planning committee with representation from Family and Children's Center and the School City of Mishawaka was established in the Fall of 1990. This committee met throughout the 1990-91 school year to plan the proposed program and deal with the various essentials of the program, e.g., funding, facilities, and personnel.

15. By the Spring of 1991, the administrators at Family and Children's Center and School City of Mishawaka agreed that most of the children living on the Children's Campus or in their group homes would receive their summer school from Family Children's Center staff, and School City of Mishawaka would start providing special education for all eligible disabled children at the beginning of the 1991-92 school year. According to questionnaire information provided by Family and Children's Center, during the summer of 1991, 93 students received summer school from Family and Children's Center staff and ten (10) were served by School City of Mishawaka staff. According to Family and Children's Center questionnaire information, one (1) of the students had summer school noted in his Individualized Education Programs.

16. In a letter dated August 8, 1991, to board members of Family and Children's Center, the new Superintendent of School City of Mishawaka stated:

"The School City of Mishawaka will provide a summer educational program for the students at the FCC to correspond to summer school programs provided for the students in the Mishawaka Community as prescribed by law. Currently, no special education summer school program is provided for either junior high school or senior high school students. Classes are provided for elementary, special education students. Thus, School City of Mishawaka accepts the responsibility of providing a summer school program for elementary special education students at the FCC."

17. According to the Director of Special Education, School City of Mishawaka makes it a practice to provide extended school year programming for children who are disabled at every level; elementary, junior high, and high school. Some children attend summer school on a "choice" basis (meaning it is not a need identified by a case conference committee). Other children are offered an extended school year because it is specifically noted on their Individualized Education Programs. According to the FCC student-specific questionnaires, of the ten (10) Family and Children's Center students who were in School City of Mishawaka's various summer programs in the summer of 1991, nine (9) were there on a "choice" basis and one (1) student had summer school noted in his IEP.

18. According to the Director of Special Education and the Coordinator of Children's Services at the Family and Children's Center program, School City of Mishawaka personnel suggested, and Family and Children's Center personnel agreed, that the School City of Mishawaka's processing of the student referrals should be delayed until the Spring of 1991 since the turnover rate at the Center was high and many of the students at Family and Children's Center during the 1990-91 school year would not be there for the 1991-92 school year.

19. According to the Director of Special Education, in the late spring of 1991, the Family and Children's Center presented the district

with 86 individual students' files with personally identifiable information to process for possible special education. As the district prepared for case conferences in August of 1991, only 38 of the 86 students were residents in the district. At that time, the district was presented with an additional 36 records that represented new residents at Family and Children's Center.

20. The Director of Special Education indicated the School City of Mishawaka did not reject any referrals of any children living at the Family Children's Center or of any children who were living at the group home in Mishawaka. This was corroborated by the Family and Children's Center questionnaire data which indicated School City of Mishawaka did not reject any referrals at any time during the 1990-91 school year and up to the present time (questionnaire dated October 31, 1991).

21. In a letter dated July 25, 1991, from the new Superintendent of School City of Mishawaka to the President of the Family and Children's Center, the Superintendent of School City of Mishawaka stated that School City of Mishawaka "**will educate the children enrolled at the Family and Children's Center and living within the confines of the school corporation for whom School City of Mishawaka has a legal obligation. Students living outside our boundaries will attend the appropriate school corporation The two programs currently housed in the South Bend Community School Corporation area cannot be accommodated by School City of Mishawaka.**"

22. Based on a review of ten (10) randomly selected educational records and a review of questionnaires completed by Family and Children's Center staff and School City of Mishawaka staff on each child referred to School City of Mishawaka for possible special education and correspondence received from the Director of Special Education, the following facts are presented:

    a) All referrals were processed within 40 school days from the initiation of the referrals to the convening of the case conference committees. Initiation of a referral was the date personally identifiable information was presented to School

City of Mishawaka officials. Many of the students already had the necessary evaluations completed as a requirement for entry into Family and Children's Center;

b) Proper evaluation data is present in each student's file;

c) Surrogate parents were appointed for those children that needed them;

d) The files contained documentation that the parents or educational surrogate parents were presented their due process and procedural safeguard rights;

e) The files contained the necessary educational assessments;

f) The proper persons were in attendance at the case conferences, i.e. the case conferences were properly constituted; and

g) Individualized Education Programs were developed by the case conference committee and present in each student's file.

23. According to the Director of Special Education, she made a very concerted effort to assure all Family and Children's Center Mishawaka students started on the first day of school on August 27, 1991. The school principal acknowledged a few children were delayed until August 29, 1991, but felt the delays were justified.

26. An analysis of the weekly attendance reports of Family and Children's Center and follow-up interviews with the school principal indicated that on the first day of school (August 27, 1991) of the 1991-92 school year, all Family and Children's Center students who resided in the corporate boundaries of School City of Mishawaka started school on the first day of school with the following exceptions: there were three students who were not in school due to the fact that case conferences had not taken place. One student had entered Family and Children's Center on July 18, 1991 and was originally scheduled for case conference on August 13, 1991, but the case conference was delayed till August 29, 1991 because certain records were not available on August 13, 1991. The other two students for whom school was delayed until August 29, 1991, were delayed because they entered on August 20 and

August 22 respectively and it took about a week to do the necessary analysis of the students' records (to determine if all the necessary evaluations had been completed) and to schedule case conferences. There were several other children absent on the first day of school, but their absences were legitimate and they were not absent because their case conferences had been delayed.

25. According to a review of the questionnaires completed by the Director of Special Education, there was one child who was "**not case conferenced until October 17 due to oversight, but services began 8-27-91.**"

26. According to student-specific School City of Mishawaka questionnaire data, there were seven (7) students who were under the auspices of Family and Children's Center that School City of Mishawaka served in special education in their regular schools during the 1990-91 and 1991-92 school years that were counted in their December 1 special education counts for state special education, additional pupil count (APC). Six (6) of these students were also counted for federal reimbursement. The Director of Special Education stated that School City of Mishawaka did not claim any children for special education reimbursement the district was not serving in special education.

27. According to a questionnaire completed by Family and Children's Center officials, all parents, guardians, and surrogate parents were made aware of their rights pertaining to due process and procedural safeguards. This was corroborated by a record check (10 records) wherein it was documented that the parents/surrogate parents had received notification of their "rights."

Conclusions of Law:

1. In regard to allegation #1, and based on an analysis of Findings of Facts #1-#27, it is concluded that School City of Mishawaka has made special education and related services available to all eligible children at Family and Children's Center during the 1990-91 and 1991-92 school years who have been referred to School City of

Mishawaka. The fact that the previous Superintendent of School City of Mishawaka was initially hesitant to accept the responsibility for the program (Finding of Fact #10) did not stop the referral process for special education or prevent any children from receiving a free appropriate public education (Findings of Fact #19, #22, and #23).

This conclusion is predicated on the fact that the children who are under the auspices of Family and Children's Center but who reside in the group homes within the corporate boundaries of South Bend Community Schools are not the educational responsibility of School City of Mishawaka, but rather are the responsibility of South Bend Community Schools. In Indiana, local school corporations are required to ensure the provision of a free appropriate public education for all children that reside within the jurisdiction of the public agency. School City of Mishawaka did provide special education in a timely manner during the 1990-91 and 1991-92 school years for all the children who were referred and for whom they had responsibility, i.e., the children who resided in the school district at Family and Children's Center or in the group home in Mishawaka.

The investigator considered the complainant's contention that the children in South Bend group homes actually resided in Mishawaka because residence is established by not only where one "lives" but also by one's intentions to remain there. The investigator concluded that the children at the Family and Children's Center in South Bend live in South Bend and thus are South Bend's responsibility, because that is where the children sleep, even though the children in the group homes do not intend to remain there. The residency requirement of "intentions to remain" is not relevant in this case. The children on the main campus and in the group homes live in temporary residences. Neither group will remain in these temporary residences for extended periods.

2. In regard to allegation #2, and based on Findings of Fact #1, #4, #11, #12, #13, and #18-#25, it is concluded that School City of Mishawaka employed the proper procedures for determining

whether Family and Children's Center residents were eligible for special education and related services, i.e. they accepted and processed referrals within Rule S-1 timelines, made sure that the proper evaluations were available, appointed educational surrogates as needed, case conferenced students with the proper persons attending the conferences, developed individualized education programs in the case conference meetings, and started the students' programs in a timely manner.

The one student who was placed prior to case conferencing represents an isolated incident that has been corrected. The district is in substantial compliance with Rule S-1 and was procedurally correct in determining whether Family and Children's Center residents were/are eligible for special education.

3. In regard to allegation #3, and based on Finding of Fact #26, it is concluded that School City of Mishawaka did not improperly receive State and/or Federal money specifically designated for the education of children who are disabled. School City of Mishawaka did not improperly count (for State and Federal special education reimbursement) any Family and Children's Center children they were not serving in special education.

4. In regard to allegation #4, and based on Conclusions of Law #1 and #2, and Finding of Fact #1, it is concluded the School City of Mishawaka is not in violation of its comprehensive plan that assures that they will make available special education and related services to non-public school children with disabilities residing in the jurisdiction of the school. The fact that they did not reference Family and Children's Center in their comprehensive plan that was recently submitted to the Indiana Department of Education is not a Rule S-1 violation per se, but is a concern requiring corrective action.

5. In regard to allegation #5, and based on Findings of Fact #22 and #27, it is concluded that School City of Mishawaka informed the appropriate persons (parents and educational surrogate parents) of all procedural safeguards and due process rights.

6. In regard to allegation #6, and based on Findings of Fact #13, #15 and #17, it is concluded that School City of Mishawaka had a process in place that enabled them to determine, on an individual basis, whether eligible disabled children at Family Children's Center required an extended school year. The fact that the superintendent's letter of August 8, 1991 (Finding of Fact #16) suggests certain qualifiers is contrary to what has been practiced in the district is a concern requiring corrective action.

Orders:

1. School City of Mishawaka is ordered to amend its comprehensive plan which was submitted to the Indiana Department of Education in August of 1991. The amendment must reflect current practice and must make it unequivocally clear that disabled children who are living at Family and Children's Center, or at the group home in Mishawaka, are the educational responsibility of School City of Mishawaka. A copy of this amendment is due into the Division of Special Education no later than January 24, 1992.

2. School City of Mishawaka is ordered to develop a written policy on extended year programming for disabled children who are residents of Family and Children's Center. This policy must outline the specific procedures the district will use to determine if a given child needs an extended year program and must be submitted to the Indiana Department of Education for approval. This policy is due into the Division of Special Education no later than January 24, 1992.

Appeal:

Any party may request that the Director of the Division of Special Education reconsider the Findings of Fact, Conclusion(s) of Law, and/or Order(s) of this complaint report. Such request for reconsideration shall be

submitted within fifteen (15) calendar days of the receipt of this report, shall be in writing, and contain specific sections for which reconsideration is sought with a rationale for the reconsideration. The Director of the Division of Special Education shall issue the results of the reconsideration within fifteen (15) calendar days of the receipt of the request for reconsideration. Any party disagreeing with the result of the reconsideration by the Director of the Division of Special Education may request reconsideration from the Secretary of the United States Department of Education. Either party disagreeing with the decision of the Secretary of the United States Department of Education may appeal to a civil court with jurisdiction.

Sincerely,

/s/

Carol Eby, Executive Administrator
Division of Special Education

cc: Mr. Douglas Small, Legal Counsel, Family and Children's Center, Complainant

Indiana Department of Education
Division of Special Education

January 14, 1992

Mr. Douglas D. Small
Barnes & Thornburg
6th Floor, 1st Source Bank Center
South Bend, Indiana 46601

Dear Mr. Small:

Re: Complaint #611-91

This letter is written in response to the request for reconsideration in the matter of complaint #611-91. Based on the following, the relief sought in the request for reconsideration must be denied.

Residence

The FCC request for reconsideration cites to cases in support of its proposition that the students in the group homes in South Bend are legal residents of FCC. They are not. The case law FCC cites to also distinguishes "domicile" from "residence." In the Turner case cited by FCC, the court also noted: "As distinguished from domicile, residence may be any place of abode or dwelling regardless of how temporary" (At 196-7). The definition of "legal resident" under I.C. 20-8.1-6.1 is only important to an Indiana public school corporation, as this relates to transfer tuition payments, monies FCC is not entitled to.

I.C. 20-5-2-1.2 (General Powers Act) provides that "Each school corporation shall conduct an educational program for all children who reside within the school corporation in kindergarten and in grades 1 through 12. "Further, legislative intent is stated unequivocally at I.C.

20-8.13-2(b) that children will receive a proper education, to include "[a]person less than eighteen (18) years of age who is not domiciled in Indiana and who intends to remain in Indiana for a period of time as established by rule of the state board of education." The Indiana State Board of Education, at 511 IAC 1-7-1, states the compulsory attendance law applies to "a person who is not domiciled in Indiana and who intends to remain for a period of time in excess of thirty (30) calendar days."

The question of "legal residency" is not germane to this complaint investigation. The question is where is the child? FCC indicates that an average stay is three months, but does not seriously challenge the finding of the complaint investigator that stays were for over a year. The school corporation where the home of facility is located (I.C. 20-8.1-6.1-5) will provide the educational services. If the child does not have "legal residency" within the boundaries of the serving school corporation, the serving school corporation is entitled to the excess costs from some source (county, school corporation of legal residency, the state--depending on how the student was placed). FCC does not qualify as the "parent" of any of these children so as to establish legal residency in School City of Mishawaka any more than a court's placement of a child in the Boys' School establishes legal residency in Plainfield or a placement at LaRue Carter establishes legal residency in Indianapolis.

Even for the sake of argument, assuming that the children were legal residents of School City of Mishawaka but residing at South Bend, there is no requirement that School City send its teachers/staff to the group homes. South Bend would still be serving. The "treatment" argument on page five does not apply to this investigation. Whatever milieu employed by FCC alone is not germane. The complaint investigation deals with educational concerns, not medical/treatment.

School City is required to provide educational services to school-aged students who reside at FCC's facility within the boundaries of School City; South Bend is required to provide educational services to school-aged students who reside at the group homes in South Bend. Both School City

and South Bend are entitled to count such students for state/federal purposes, and seek reimbursement of excess costs should they serve students **who do not** have legal residency within their boundaries. The question of "legal residency" is simply not a real issue; the requirement to serve is and statutory/regulatory provisions are clear.

Funding

The Complaint Investigation did not deal with transfer tuition monies; it dealt with federal and state money associated with providing special education/related services. The issues relative to transfer tuition are matters for the State Board and its hearing officer. The complaint investigator was specific on this point.

Comprehensive Plan

The complaint investigator was reviewing local policies in light of state/federal requirements. Whatever occurred in the past has been remedied. The complaint investigator, again, was not addressing transfer tuition monies, leasing arrangements or any other business relationship School City may have had with FCC. The issue is whether or not School City is providing special education/related services to disabled children residing within its district. It was not the investigator's concern whether or not the lease agreement was "a legally permissible transaction," as FCC asserts on p. 15. This is a contention FCC can place before the State Board. It has nothing to do with the issues as framed by the investigator. Additionally, it was never an issue in the complaint whether School City owes transfer tuition to FCC (see p.18). That will be a State Board matter. Our office is not empowered to order such payments.

Attorney Fees/Costs

There is no provision in state or federal law that would permit our office to award attorney fees and costs to FCC.

The request for reconsideration and this response will be added to the file for complaint #611-91 and will also be copied to the State Board of Education liaison.

Any party disagreeing with this reconsideration response may request review by the Secretary of the United States Department of Education or a civil court with jurisdiction.

Sincerely,

/s/

Paul Ash, Director
Division of Special Education

UNITED STATES DEPARTMENT OF EDUCATION
Office of Special Education and Rehabilitation Services

July 22, 1992

Mr. Douglas D. Small
Barnes and Thornburg
600 1st Source Bank
Center
100 North Michigan
South Bend, Indiana 46601

Dear Mr. Small:

I am writing in response to your request for Secretarial review of the Indiana Department of Education's (IDE) decision on a complaint that you filed on behalf of the Family and Children's Center, Inc. (FCC), concerning educational services provided by the Mishawaka, Indiana School District to children at FCC.

The Education Department General Administrative Regulations (EDGAR), at 34 CFR §76.781(c), provide that after a complaint has been filed with the State, and the State has acted on it, a party to the complaint may request that the Secretary of Education review the State's final decision. Pursuant to this regulation, the Secretary exercises this responsibility on a discretionary basis; that is, the Secretary has the authority to grant or deny the request for review.

The Secretary has delegated the responsibility for administering Part B of the Individuals with Disabilities Education Act (Part B) to the Assistant Secretary for Special Education and Rehabilitative Services. Included within this is the responsibility for determining whether to grant or deny requests pursuant to this authority, a decision has been made to deny your request. Please be advised that denial of Secretarial review does not

impede your right or the individual right of any children at FCC to pursue due process proceedings under Part B. Copies of the regulations implementing Part B and the EDGAR complaint procedures are enclosed for your information.

The consideration of your request for secretarial review was limited to those Part B issues that were addressed by IDE. Some of the issues that have been raised by FCC, such as issues related to leasing and contracting, were not addressed by IDE because they are outside of the scope of the Part B statute and regulations. The decision to deny Secretarial review is not intended to alter, or otherwise affect, any remedy that would otherwise be available to FCC under State Law.

Sincerely,

Robert R. Davila
Assistant Secretary

BEFORE THE INDIANA STATE BOARD OF EDUCATION

FAMILY & CHILDREN'S CENTER, INC.	)
Petitioners,	)
v.	)
CAUSE NO. 9109062	)
SCHOOL CITY OF MISHAWAKA	)
COMPLAINT NO. 611-91	)
Respondent.	)

ORDER

This matter is before the Indiana State Board of Education on the petition filed by the Family & Children's Center, Inc. ("FCC") against the respondent, School City of Mishawaka ("School City"). On April 27, 1992, a pre-hearing was conducted by Linda Pryor, the hearing officer appointed by the State Board of Education to hear certain issues raised in FCC's petition which had not been previously addressed in the complaint investigation conducted by the Indiana Department of Education's Division of Special Education. As a result of the proceedings in this matter, the Hearing Officer makes the following entries:

1. On September 19, 1991, FCC filed a petition with the Indiana Department of Education seeking an order granting relief from certain activities and positions taken by School City with respect to the education of emotionally handicapped children over which FCC has legal custody and for whom FCC provides care and treatment (the "Handicapped Children"). See Exhibit A.

2. After the filing of FCC's petition, the Indiana Department of Education ("DOE") determined to address FCC's petition in a two-part manner. The first step was to conduct an investigation under 511 IAC 7-1-7 through the DOE's Division of Special Education (the "Division) of alleged Rule S-1 violations. For the second step, the DOE indicated that the issues not addressed in the Rule S-1 Investigation would be addressed

by way of hearing before a DOE hearing officer. The DOE further indicated that the Rule S-1 Investigation would proceed first and that the hearing portion of the administrative proceedings would not commence until the Rule S-1 Investigation and ruling process had concluded.

3. The Division in a letter dated October 10, 1991, defined the issues it would investigate and thereby defined the scope of its investigation. A copy of the letter is attached as Exhibit B.

4. FCC objected to the Division's delineation of issues and submitted a Request for Restatement of Issues, which was received by the DOE on October 23, 1991. A copy of that Request for Restatement is attached as Exhibit C. The DOE, however, did not grant FCC's request, leaving the remaining issues not addressed by the Division for resolution by the hearing process.

5. The Rule S-1 Investigation went forward and on December 9, 1991, the Division entered its Findings of Fact, Conclusions of Law, and Order. On December 22, FCC filed a Request for Reconsideration and on January 14, 1992, the Division denied FCC's Request. FCC has appealed the findings of the Rule S-1 Investigation to the United States Department of Education. This appeal is now pending.

6. The DOE scheduled a hearing to occur on April 27, 1992. That hearing was to address the remaining issues raised by FCC's petition which were specifically not addressed in the Rule S-1 Investigation.

7. On April 20, 1992, School City filed a motion to dismiss and supporting memorandum contending that the Hearing Officer did not have jurisdiction to conduct a hearing on the remaining issues in FCC's petition, more specifically issues relating to transfer tuition pursuant to I.C. 20-8.1-6.1-10.

8. FCC filed a memorandum in opposition to School City's motion to dismiss but no longer opposes dismissal of this matter.

9. Based upon the foregoing, the arguments and written authorities submitted by counsel and the overall record in this proceeding, it is hereby

ORDERED, ADJUDGED, AND DECREED as follows:

A. FCC's petition is dismissed with prejudice with respect to all issues not specifically addressed by the Division as part of the Rule S-1 review procedure. It is determined that the DOE does not have jurisdiction

to hear or authority to otherwise resolve the claims and issues raised by FCC in its petition that have not otherwise been addressed as part of the Rule S-1 review procedure.

B. It is determined that FCC and School City have exhausted their administrative remedies with respect to all claims, defenses and issues in this matter which were not considered as part of the Rule S-1 review procedure and which are not a part of the Appeal to the United States Department of Education.

/s/

May 15, 1992

Linda K. Pryor, Hearing Officer
for the State Board of Education

Copies to:

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UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

AMENDED: March 17, 1994
March 15, 1994
HON. WALTER J. CUMMINGS, Circuit Judge
HON. JOEL M. FLAUM, Circuit Judge
HON. HUBERT L. WILL, District Judge

FAMILY & CHILDREN'S CENTER, INCORPORATED, Plaintiff-Appellant,	) Appeal from the United States District Court for the Northern District of Indiana, South Bend Division.
No. 93-1843 v.	)
SCHOOL CITY OF MISHAWAKA, Defendant-Appellee.	) No. 92 C 327) Allen Sharp,) Chief Judge.

AMENDED ORDER

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above-entitled cause on February 4, 1994, by defendant-appellee, no judge in active service has requested a vote thereon,* and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby DENIED.

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* The Honorable Kenneth F. Ripple and The Honorable Daniel A. Manion did not participate in the consideration or decision of this matter.

Sec. 1415. Procedural Safeguards

(a) Establishment and maintenance

Any State educational agency, any local educational agency, and any intermediate educational unit which receive[s] assistance under this subchapter shall establish and maintain procedures in accordance with subsection (b) through subsection (e) of this section to assure that children with disabilities and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies and units.

(b) Required procedures; hearing

(1) The procedures required by this section shall include, but shall not be limited to--

(A) an opportunity for the parents or guardian of a child with a disability to examine all relevant records with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child;

(B) procedures to protect the rights of the child whenever the parents or guardian of the child are not known, unavailable, or the child is a ward of the State, including the assignment of an individual (who shall not be an employee of the State educational agency, local educational agency, or intermediate educational unit involved in the education or care of the child) to act as a surrogate for the parents or guardian;

(C) written prior notice to the parents or guardian of the child whenever such agency or unit--

(i) proposes to initiate or change, or

(ii) refuses to initiate or change, the identification, evaluation, or educational

placement of the child or the provision of a free appropriate public education to the child;

(D) procedures designed to assure that the notice required by clause (C) fully informs the parents or guardian, in the parents' or guardian's native language, unless it clearly is not feasible to do so, of all procedures available pursuant to this section; and

(E) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.

(2) Whenever a complaint has been received under paragraph (1) of the subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child.

(c) Review of local decision by State educational agency

If the hearing required in paragraph (2) of subsection (b) of this section is conducted by a local educational agency or an intermediate educational unit, any party aggrieved by the findings and decision rendered in such a hearing may appeal to the State educational agency which shall conduct an impartial review of such hearing. The officer conducting such review shall made an independent decision upon completion of such review.

(d) Enumeration of rights accorded parties to hearings

Any party to any hearing conducted pursuant to subsections (b) and (c) of this section shall be accorded--

(1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities,

(2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses,

(3) the right to a written or electronic verbatim record of such hearing, and

(4) the right to written findings of fact and decisions (which findings and decisions shall be made available to the public) consistent with the requirements of section 1417(c) of this title and shall also be transmitted to the advisory panel established pursuant to section 1414(a)(12) of this title.

(e) Civil action; jurisdiction

(1) A decision made in a hearing conducted pursuant to paragraph (2) of subsection (b) of this section shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (c) and paragraph (2) of this subsection. A decision made under subsection (c) of this section shall be final, except that any party may bring an action under paragraph (2) of this subsection.

(2) Any party aggrieved by the findings and decision made under subsection (b) of this section who does not have the right to an appeal under subsection (c) of this section, and any party aggrieved by the findings and decision under subsection (c) of this section, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance

of the evidence ,shall grant such relief as the court determines is appropriate.

(3) During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

(4) (A) The district courts of the United States shall have jurisdiction of actions brought under this subsection without regard to the amount in controversy.

(B) In any action or proceeding brought under this subsection, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents or guardian of a child or youth with a disability who is the prevailing party.

(C) For the purpose of this subsection, fees awarded under this subsection shall be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished. No bonus or multiplier may be used in calculating the fees awarded under this subsection.

(D) No award of attorneys' fees and related costs may be made in any action or proceeding under this subsection for services performed subsequent to the time of a written offer of settlement to a parent or guardian if--

(i) the offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, in the case of an administrative proceeding, at any time

more than ten days before the proceeding begins;

(ii) the offer is not accepted within ten days; and

(iii) the court or administrative officer finds that the relief finally obtained by the parents or guardian is not more favorable to the parents or guardian that the offer of settlement.

(E) Notwithstanding the provisions of subparagraph (D), an award of attorneys' fees and related costs may be made to a parent or guardian who is the prevailing party and who was substantially justified in rejecting the settlement offer.

(F) Whenever the court finds that--

(i) the parent or guardian, during the course of the action or proceeding, unreasonably protracted the final resolution of the controversy;

(ii) the amount of the attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, experience, and reputation; or

(iii) the time spent and legal services furnished were excessive considering the nature of the action or proceeding, the court shall reduce, accordingly, the amount of the attorneys' fees awarded under this subsection.

(G) The provisions of subparagraph (F) shall not apply in any action or proceeding if the court finds that the State or local educational agency unreasonably

protracted the final resolution of the action or proceeding or there was a violation of this section.

(f) Effect on other laws

Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, title V of the Rehabilitation Act of 1973 [29 U.S.C. 790 et seq.], or other Federal statutes protecting the rights of children and youth with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (b)(2) and (c) of this section shall be exhausted to the same extent as would be required had the action been brought under this subchapter.

(Pub. L. 91-230, title VI, Sec. 615, as added Pub. L. 94-142, Sec. 5(a), Nov. 29, 1975, 89 Stat. 788 and amended Pub. L 99-372, Secs. 2, 3, Aug. 5, 1986, 100 Stat. 796, 797; Pub. L. 100-630, title I, Sec. 102(e), Nov. 7, 1988, 102 Stat. 3294; Pub. L. 101-476, title IX, Sec. 901(b)(71)-(75), Oct. 30, 1990, 104 Stat. 1145; Pub. L. 102-119, Sec. 25(b), Oct. 7, 1991, 105 Stat. 607.)

Sec. 300.506 Impartial due process hearing

(a) A parent or a public educational agency may initiate a hearing on any of the matters described in Sec. 300.504(a)(1) and (2).

(b) The hearing must be conducted by the SEA or the public agency directly responsible for the education of the child, as determined under State statute, State regulations, or a written policy of the SEA.

(c) The public agency shall inform the parent of any free or low-cost legal and other relevant services available in the area if--

(1) The parent requests the information; or

(2) The parent or the agency initiates a hearing under this section.

(Authority: 20 U.S.C. 1415(b)(2))

State Complaint Procedures

Sec. 300.660 Adoption of State complaint procedures

Each SEA shall adopt written procedures for:

(a) Resolving any complaint that meets the requirements of Sec. 300.662 by--

(1) Providing for the filing of a complaint with the SEA; and with a public agency and the right to have the SEA review the public agency's decision on the complaint.

(b) Informing parents and other interested individuals about the procedures in Secs. 300.660-300.662.

(Authority: 20 U.S.C. 2831(a))

Sec. 300.661 Minimum State complaint procedures

Each SEA shall include the following in its complaint procedures;

(a) A time limit of 60 calendar days after a complaint if filed under Sec. 300.660(a) to--

(1) Carry out an independent on-site investigation, if the SEA determines that such an investigation is necessary;

(2) Give the complainant the opportunity to submit additional information, either orally or in writing, about the allegations in the complaint;

(3) Review all relevant information and make an independent determination as to whether the public agency is violating a requirement of part B of the Act or of this part; and

(4) Issue a written decision to the complainant that addresses each allegation in the complaint and contains --

(i) Findings of fact and conclusions; and

(ii) The reason for the SEA's final decision.

(b) An extension of the time limit under paragraph (a) of this section only if exceptional circumstances exist with respect to a particular complaint.

(c) Procedures for effective implementation of the SEA's final decision, if needed, including technical assistance activities, negotiations, and corrective actions to achieve compliance.

(d) The right of the complainant or the public agency to request the Secretary to review the SEA's final decision.

(Authority: 20 U.S.C. 2831(a))

Sec. 300.662 Filing a complaint

An organization or individual may file a signed written complaint under the procedures described in Secs. 300-600-300.661. The complaint must include--

(a) A statement that a public agency has violated a requirement of part B of the Act or of this part; and

(b) The facts on which the statement is based.

(Authority: 20 U.S.C. 2831(a))

Complaint Procedures of the state

§ 76.780 A State shall adopt complaint procedures.

(a) A State shall adopt written procedures for:

(1) Receiving and resolving any complaint that the State or a subgrantee is violating a Federal statute or regulations that apply to a program;

(2) Reviewing an appeal from a decision of a subgrantee with respect to a complaint; and

(3) Conducting an independent on-site investigation of a complaint if the State determines that an on-site investigation is necessary.

(b) Sections 76.780-76.782 apply to the program under Title IV of the Elementary and Secondary Education Act unless administrative funds for that program are appropriated under Title V-A of that Act.

(c) Sections 76.780-76.782 do not apply to the program under Title I of the Elementary and Secondary Education Act.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 76.781 Minimum complaint procedures.

A State shall include the following in its complaint procedures:

(a) A time limit of 60 calendar days after the State receives a complaint:

(1) If necessary, to carry out an independent on-site investigation; and

(2) To resolve the complaint.

(b) An extension of time limit under paragraph (a) of this section only if exceptional circumstances exist with respect to a particular complaint.

(c) The right to request the Secretary to review the final decision of the State.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 76.782 An organization or individual may file a complaint.

An organization or individual may file a written signed complaint with a State. The complaint must include:

(a) A statement that the State or a subgrantee has violated a requirement of a Federal statute or regulations that apply to a program; and

(b) The facts on which the statement is based.

(Authority: 20 U.S.C. 1221e-3(a)(1))

§ 76.783 State educational agency action--subgrantee's opportunity for a hearing.

(a) A subgrantee may request a hearing if it alleges that any of the following actions by the State educational agency violated a State or Federal statute or regulation:

(1) Ordering, in accordance with a final State audit resolution determination, the repayment of misspent or misapplied Federal funds; or

(2) The procedures in § 76.401(c)(2)-(7) apply to any request for a hearing under this section.

Note: This section is based on a provision in the General Education Provisions Act (GEPA). Section 427 of the Department of Education Organization Act (DEOA), 20 U.S.C. 3487, provides that except to the extent inconsistent with the DEOA, the GEPA "shall apply to functions transferred by this Act to the extent applicable on the date preceding the effective date of this Act."

Although standardized nomenclature is used in this section to reflect the creation of the Department of Education, there is no intent to extend the coverage of the GEPA beyond that authorized under Section 427 or other applicable law.

(Authority: 20 U.S.C. 1231b-2) [45 FR 22517, Apr. 3, 1980. Redesignated at 45 FR 77368, Nov. 21, 1980, and amended at 45 FR 86296, Dec. 30, 1980]

511 IAC 7-15-4 Complaints

Sec. 4.

(a) Any individual, group of individuals, agency, or organization may file a complaint alleging violations of federal or state laws that apply to special education programs. The complaint shall:

(1) be in writing;

(2) indicate the allegations of the technical violation(s) and the circumstances on which the allegations are based;

(3) be signed by the complainant(s); and

(4) be submitted to the division of special education.

(b) The division of special education shall develop and implement written procedures to investigate complaints. These procedures shall be available upon request and shall include the following:

(1) A system to follow when complaints are received by the division of special education office including the following:

(A) Determination of the issues.

(B) Assignment of an individual to investigate and monitor compliance.

(2) The timelines for the investigation, issuance of a report, and monitoring compliance.

(c) The individuals assigned as complaint investigators shall be trained employees of the department of education, or other state agencies, as appropriate.

(d) The investigation of a complaint may involve off-site and on-site investigation procedures. The complaint investigator shall have the following responsibilities:

(1) Contacting the complainant and the public agency named in the complaint to clarify the issues, if necessary.

(2) Determining what investigation procedures will be necessary and notifying both parties regarding those procedures.

(3) Conducting the investigation.

(4) Filing a written response with:

(A) The complainant.

(B) The superintendent or chief executive officer of the public agency involved.

(C) The special education program administrator of the special education planning district involved.

(D) The director of the division of special education.

(E) The designated administrator of the state agency responsible for the administration and operation of the state agency programs, if appropriate.

(5) Facilitating, or providing for, negotiations between the parties, if necessary.

(6) Providing technical assistance to assist in achieving compliance.

(e) The final written response of the complaint investigator shall be filed within thirty (30) calendar days of the date the written complaint is received. An extension of time may be granted by the director of the division of special education only if exceptional circumstances exist with respect to a specific complaint. In that event, all parties shall be notified in writing of the extension and the reasons for it.

(f) Orders issued by the complaint investigator shall be binding on the public agency unless appealed by the public agency. The timelines for the public agency to submit a corrective action plan and to achieve compliance shall be included in the complaint investigator's report. Compliance with orders issued by the complaint investigator shall be monitored by the division of special education.

(g) Failure of the public agency to achieve compliance with orders issued by a complaint investigator shall result in the withholding of federal and state funds to the public agency.

(h) Either the public agency or the complainant may request reconsideration by the director of the division of special education of any part of a complaint report. A request for reconsideration must be filed within fifteen (15) calendar days of the date the

complaint report is received by the public agency and the complainant. The request for reconsideration shall:

(1) be sent to the director of the division of special education;

(2) be in writing, with a copy sent to the other party;

(3) state the specific portions of the report the party believes should be reconsidered with specific reasons to support the request.

(i) Reconsideration of a complaint report shall be conducted by the director of the division of special education. Written notice of the result of that reconsideration shall be issued within fifteen (15) calendar days of the date of the request for reconsideration is received by the director of the division of special education.

(j) Any party disagreeing with the result of the reconsideration by the director of the division of special education may appeal to the Secretary of the United States Department of Education. Either party disagreeing with the decision of the Secretary of the United States Department of Education may appeal to a civil court with jurisdiction.

511 IAC 7-15-5 Due process hearings

Sec. 5.

(a) A parent, a public agency, or the state education agency may initiate a due process hearing regarding:

(1) the eligibility of a student for services under this article;

(2) the appropriateness of the educational evaluation;

(3) the appropriateness of the student's proposed or current program or placement; or

(4) any other dispute involving the provision of a free appropriate public education for the student.

(b) This section does not apply to allegations of technical violations of this article unless the allegations are directly related to a due process hearing issue with resect to the student. Due process hearing issues must present a dispute regarding a current case or controversy involving a student.

(c) A request for due process hearing and the appointment of an independent hearing officer shall:

(1) be in writing and signed;

(2) be filed simultaneously with the other parties or their agents and the state superintendent of public instruction; and

(3) specify the reasons for the hearing request.

(d) The state superintendent of public instruction shall appoint the independent hearing officer. When a due process hearing request is received, the public agency and the parent will be sent a written notice of the name of the independent hearing officer who has been assigned to the matter.

(e) A person who may be appointed as an independent hearing officer shall:

(1) be trained in the due process hearing procedures;

(2) have no personal or professional interest that would conflict with the person's objectivity in the hearing; and

(3) not be an officer, employee, or agent of the public agency, the department of education, or any other agency that may be involved in the education or care of the student.

(f) A person who otherwise qualifies as a hearing officer is not considered an employee of the agency solely because the person is paid by the agency to serve as a hearing officer. The division of special education and the public agencies shall maintain a current listing of the persons who serve as hearing officers, including information on the qualifications of those persons.

(g) Due process hearings shall be conducted within thirty (30) calendar days of the date the request is received by the state superintendent of public instruction. At the request of any party to the hearing, the hearing officer may grant specific extensions of time beyond the thirty (30) calendar days. Any extension of time granted by the hearing officer shall be in writing to all parties and included in the record of the proceedings.

(h) Unless the parties agree otherwise, the student involved shall remain in the student's present educational placement during a due process hearing, administrative hearing appeal, or judicial proceeding. If the proceedings extend beyond the end of the school year and the placement includes normal grade advancement, that advancement shall priced unless normal grade advancement is at issue.

(i) If the issue of the proceedings involves initial enrollment in a public school, the student, with the consent of the parent, shall be placed in the public school program until the completion of the proceedings. If the parties cannot agree to the student's placement during the proceedings, the hearing officer shall determine the student's placement as a preliminary matter to the conduct of the due process hearing.

(j) Any party to a due process hearing has the right to:

(1) be accompanied and advised by legal counsel and by individuals with knowledge and training with respect to special education;

(2) present evidence, confront, cross-examine, and compel the attendance of any witnesses who may have pertinent information;

(3) prohibit the introduction of any evidence at the hearing which has not been disclosed at least five (5) business days prior to the hearing;

(4) separation of witnesses who are not parties to the dispute;

(5) obtain a verbatim transcript following the conclusion of the proceedings;

(6) obtain written findings of fact and decision; and

(7) be provided with an interpreter, if any party to the hearing has a hearing or speaking impairment or other difficulty in communicating, or whose native language is not English.

(k) The hearing officer has the discretion and authority to:

(1) issue subpoenas;

(2) determine whether individuals are knowledgeable with respect to special education in order to assist in the proceedings.

(3) frame and consolidate issues in the hearing to provide clarity; and

(4) rule on any other matters with respect to the conduct of a due process hearing, subject to administrative or judicial review of abuse of such discretion or authority, mistake in law as to exercise of such discretion or authority, or that such authority was exercised in an arbitrary or capricious manner.

(l) A parent, or the parent's representative, involved in a due process hearing has the right to:

(1) have the student who is the subject of the hearing attend;

(2) have the hearing opened or closed to the public;

(3) inspect and review prior to the hearing any records pertaining to the student maintained by the public agency, its agents, or employees, including all tests and reports upon which the proposed action may be based; and

(4) recorder attorney fees as part fo the parent's costs should it be determined the parent ultimately prevailed.

(m) The public agency shall inform the parent of free or low-cost legal services available.

(n) The hearing shall be held at a time and place reasonably convenient to all parties to the hearing. The notice of time and place shall be in writing to all parties.

(o) The public agency shall bear all costs pertaining to the conduct of a hearing whether or not a hearing is ultimately held, including transcription, hearing officer fees and expenses. When the hearing is initiated by or against the state education agency regarding the proposal or denial of alternative or residential services under 511 IAC 7-12-5, the state education agency shall be responsible for the aforementioned costs.

(p) The decision of the hearing officer shall be based solely upon the oral and written evidence presented at the hearing. The public agency bears the burden of proof regarding the appropriateness of the proposed or refused action except when the hearing has been initiated pursuant to 511 IAC 7-12-5. In that case, the state education agency bears the burden of proof regarding the appropriateness of its decision with respect to residential placement for the student.

(q) A verbatim record of the hearing shall be made and transcribed. The record shall be made available by the division of special education at no coast and upon the request of any party to the hearing. The hearing officer is responsible for ensuring the hearing is recorded or transcribed.

(r) The hearing officer shall render a written decision in the matter within fifteen (15) calendar days following the hearing. The decision shall be dated and must include the following:

(1) Findings of fact and conclusions of law.

(2) A decision and orders, if necessary.

(3) Notice of the right and the means to appeal the decision and orders.

(s) Class action due process hearings are not permitted. If the parties agree to a simultaneous hearing involving two (2) or more students, a separate decision with specific findings of fact, conclusions of law, and orders, if necessary, shall be written for each student.

(t) The hearing officer shall mail a copy of the hearing decision to each party involved in the hearing. The hearing officer's decision is binding on all parties.

(u) Any party involved shall have thirty (30) calendar days from the date the hearing officer's written decision is received to:

(1) implement the order(s) in the hearing decision; or

(2) initiate an appeal as described in section 6 of this rule.

(v) The division of special education shall maintain the following:

(1) The original hearing decision.

(2) The transcript of the hearing.

(3) The exhibits admitted by the hearing officer.

(4) All notices, pleadings, exceptions, motions, requests and other papers filed in the hearing.

(w) The division of special education shall, after deleting personally identifiable information from copies of the due process hearing findings, conclusions, and order(s):

(1) Transmit a copy of the document to the state advisory council on the education of children and youth with disabilities.

(2) Maintain a copy of the document for public review in its offices.

(x) Due process hearings under this section shall be conducted pursuant to IC 4-21.5-3 and this section.

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Attorney at Law
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Digest of Inquiry
(June 28, 1991)

Are the due process and complaint procedures separate and distinct remedies available to children with disabilities and their parents?

-Under what circumstances may a state educational agency (SEA) decline to investigate a complaint?

-Can the state educational agency (SEA) decline to investigate a complaint which is filed at the same time as a due process hearing request, but involving different issues?

-If a hearing officer renders a decision on an issue which is also raised in an SEA complaint, or refuses to make a decision on an issue which is also raised in an SEA complaint, may the SEA compliance officer decline to investigate the issue independently?

- Must a parent resort to judicial review to appeal a hearing officer's decision on issues which are also raised in an SEA complaint, or a hearing officer's refusal to render a decision on issues which are also raised in an SEA complaint?

- Are parents bound to a hearing decision on the same issues as an SEA complaint, or may they rely on the SEA investigation decision?

Digest of Response
(December 4, 1991)

Due Process, SEA Complaint Procedures are Separate Remedies:

The due process and state educational agency (SEA) complaint procedures are separate, distinct, and independent remedies available to children with disabilities and their parents to resolve issues of disagreement with local school districts. If an issue has previously been decided in a due

process hearing, then the hearing decision should prevail over an SEA complaint investigation of the same issue. Alternatively, the results of an SEA complaint investigation may be presented as evidence in a due process hearing.

Complaint Investigation Should Wait until Completion of Hearing:

When the parents of a child with a disability have simultaneously requested a due process hearing and an SEA complaint investigation, the SEA may hold in abeyance the portion of its investigation which is also the subject of the due process hearing, in order to avoid conflicting decisions on the same issues. However, the SEA may not refuse to investigate a complaint where the parents were entitled to a due process hearing but chose only to file an SEA complaint.

SEA May Not Wait to Resolve Complaint on Different Issues:

Under the EDGAR regulations at 34 C.F.R. 76.780-76.782, an SEA must investigate and resolve any complaint within 60 calendar days, with the exception of those issues which are simultaneously raised in a due process hearing.

SEA Must Review Complaint Issues Not Covered by Hearing Decision:

A hearing officer's decision should generally prevail over the decision in an SEA complaint investigation on the same specific issue. However, an SEA compliance officer may not refuse to investigate an issue which has not been covered by a due process hearing decision.

Hearing Decisions on Same Issues Must Be Appealed to Court:

The appropriate means to appeal a hearing officer's decision on an issue which is also raised in an SEA complaint, or to seek an order to compel a hearing officer to decide an issue which is also raised in an SEA complaint, is to bring an action in state or federal court. However, a hearing officer's refusal to hear an issue which is also raised in an SEA complaint may be an appropriate issue for a subsequent SEA complaint.

Parents, School District Are Bound by Hearing Officer's Decision:

Under Part B, both the parents of a child with a disability and the local school district are entitled to initiate due process proceedings, and both parties are bound by any decision rendered by the hearing officer. Furthermore, the fact that the parents would prefer to use the SEA complaint procedure may not be grounds for the hearing officer to dismiss the due process proceedings.

Text of Inquiry

A prompt opinion letter would be appreciated as I have a case in progress on the following issues and wish to challenge a state finding:

(1.) Is it true that the due process procedure and a state compliance complaint process are two separate, distinct and independent remedies available to handicapped children and their parents under the Education of the Handicapped Act? That is, they are not dependent or interdependent and the findings of either process do not bar the use of the other as a remedy?

If a parent files a compliance complaint with the state for statutory or regulatory violations by the school system, can the school system file due process against the parents and bar an independent compliance investigation and findings by the state and a subsequent federal secretarial review? Can a school system use this method to wear out the parents' financial resources to avoid independent state compliance authority and risk the possible withholding of state and federal funds?

(2.) Can a state compliance officer stop investigating a compliance violation complaint if either party files for a due process hearing on (1) the same issues or (2) on different issues? If so, why? On what statutory authority or case law do you rely?

(3.) If the hearing officer renders a decision (1) on the same compliance violation issues or (2) refuses to hear or does not issue findings on the same compliance violation issues, can the state compliance officer refuse to independently investigate, issue findings and take action on the parents' compliance violation complaint?

Is a parent's only remedy, once a due process has been filed by either party, to appeal up to the Supreme Court if necessary a hearing officer's decision (1) on the same compliance violation issues or (2) his refusal to hear or not issue findings on the same compliance issues? School systems utilize taxpayers' funds in litigation. The parents' rights are limited by their pocketbooks. If due process is started by either party, is it the parents responsibility to enforce the law?

Do the parents have the right to decide not to pursue due process and costly and lengthy appeal process if filed by either party but to rely upon the state compliance process as an alternative remedy? If due process can eradicate state compliance enforcement, federal compliance monitoring and any risk to the loss of state and federal funds to them, school systems can eliminate any of that exposure for serious compliance violations. They can just take on the parents and easily wear them out financially and avoid compliance monitoring. This result would leave it to the parents to enforce school district's compliance with the law. Your prompt response is needed and would be appreciated.

Text of Response

This is in response to your faxed inquiries to my Office dated June 28 and June 29, 1991, received by my staff on July 1, 1991. In your inquiry, you posed several questions to the U.S. Department of Education relating to the due process and complaint procedures as defined in 34 CFR §§300.506-300.511, as well as in 34 CFR §§76.780-76.782. You also posed several questions regarding the Secretarial review process.

A statement of the question and the Department's response follows:

(1)(a) Is it true that the due process procedure and a state compliance complaint process are two separate, distinct and independent remedies available to handicapped children and their parents under the education of the handicapped act? That is, they are not dependent or interdependent and the findings of either process do not bar the use of the other as a remedy?

The answer to the first part of this question is yes. The due process and complaint procedures are two separate, distinct, or independent remedies available to students with disabilities and their parents, to resolve

issues of disagreement between parents and local school districts. If an issue has been decided in a due process hearing, that decision will prevail over a State educational agency (SEA) complaint investigation decision on the same issue. However, the results of a complaint investigation may be used as evidence in a due process hearing.

The Office of Special Education Programs (OSEP) recognizes that SEAs often receive complaints that appear to involve disagreements between parents and school districts over the identification, evaluation, educational placement, or the provision of a free appropriate public education to a particular child. However, it is impermissible for an SEA to have a procedure that automatically removes such complaints from the jurisdiction of its complaint management system until after a due process hearing is conducted. The Education Department General Administrative Regulations (EDGAR) require the SEA to resolve any complaint it receives, regardless of whether the complaint concerns a matter that is also an appropriate subject for a request for a due process hearing under 34 CFR §300.506(a).

Whenever an SEA receives a complaint alleging that "the State or a subgrantee is violating a Federal statute or regulations that apply to a program," EDGAR requires that the SEA must investigate and resolve the complaint within 60 calendar days of the date the complaint was received. 34 CFR 76.781(a).

(l)(b) If a parent files a compliance complaint with the State for statutory or regulatory violations by the school system, can the school system file due process against the parent and bar an independent compliance investigation and findings by the State and a subsequent Federal secretarial review? Can a school system use this method to wear out the parents' financial resources to avoid independent state compliance authority and risk the possible withholding of State and federal funds?

There are circumstances when it may be appropriate for the State to hold a complaint in abeyance. If a parent has already filed a request for a due process hearing on the same issue and then files a complaint with the State or simultaneously files a request for a due process hearing, it is reasonable for the State to hold that portion of a complaint, which is the subject of the due process hearing in abeyance, and defer to the hearing

officer's judgement to avoid the possibility of conflicting decisions. The State cannot refuse to investigate because the parent has the opportunity to seek a due process hearing, but where the parent has already sought a due process hearing on the same issue, it is appropriate for the State to hold that portion of a complaint which is the subject of a due process hearing in abeyance.

(2) Can a State compliance officer stop investigating a compliance violation complaint if either party files for a due process hearing on (1) the same issues or (2) on different issues? If so, why? on what statutory authority or case law do you rely?

The answer to (1) is yes. A complaint investigation may be held in abeyance until a due process decision on the same issue is rendered by the hearing officer. The answer to (2) is no. If a complaint and a due process hearing request are filed at the same time on different issues (alleging violations of federal statute or regulations), then the State must receive and resolve in accordance with 34 CFR §§76.780-76.782, the complaint which is filed on issues outside of the hearing issues.

Statutory authority for this opinion is cited as 20 U.S.C. Section 615(b)(2) and 53 FR 49143.

(3)(a) If the hearing officer renders a decision (1) on the same compliance violation issues or (2) refuses to hear or does not issue findings on the same compliance violation issues, can the State compliance officer refuse to independently investigate, issue findings and take action on the parent's compliance violation complaint?

The answer to (1) is yes, the hearing officer's decision would prevail over a complaint investigation decision regarding the same specific issue. However, regarding a more general issue this may not be the case. It would depend on the circumstances and specific facts of the case. The answer to (2) is no. The SEA must investigate any complaint issue appropriately filed with the SEA which was not covered in the due process hearing.

(3)(b) Is a parent's only remedy, once a due process has been filed by either party, to appeal up to the Supreme Court if necessary a hearing officer's decision (1) on the same compliance violation issues or (2) his refusal to hear or not issue findings on the same compliance issue?

The answer to (1) is yes. If a parent disagrees with a hearing officer's decision on a specific issue, the remedy is to appeal that decision through an appropriate State or federal court of law. The State is bound by the decision and cannot overturn it through its complaint procedures. The answer to (2) is no. Generally, if the hearing officer chooses not to decide an issue, then that issue can be the subject of a complaint if the complainant feels that the State is violating a federal statute or regulation (for example, a violation of the prescribed due process hearing procedures) and files a complaint with the SEA. The SEA must then investigate and resolve the allegation. (See 34 CFR §§76.780-76.782.) If the parent disagrees with the hearing officer's decision not to hear an issue, the appropriate remedy for seeking to compel the hearing officer to decide the issue is generally through a judicial review.

(3)(c) If a due process is started by either party, is it the parents responsibility to enforce the law?

If the parent prevails in a due process hearing decision, it is the SEA's responsibility to ensure that the decision is implemented, if the local educational agency (LEA) fails to comply voluntarily (see 34 CFR §300.600).

(3)(d) Do the parents have the right to decide not to pursue due process and the costly and lengthy appeal process if filed by either party but to rely upon the State compliance process as an alternative remedy?

If either party (parents or school district) initiates a hearing, both parties are bound by any decision reached by a hearing officer. Parents cannot choose not to be bound by a hearing officer's decision, in a case initiated by the LEA, because the parent would prefer to have the case decided through the State complaint procedures. Under Part B, both the school district and the parent have a right to initiate a due process hearing. The fact that either party would prefer to use the complaint procedure is not grounds upon which a hearing officer could dismiss a due process hearing.

I am hopeful that the foregoing information is responsive to your inquiry.

Robert R. Davila

Assistant Secretary

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

March 22, 1994

Contact Person
Name: Thomas B. Irvin
Telephone: (202) 205-8825

OSEP 94-16

TO: Chief State School Officers
FROM: Thomas Hehir
Director
Office of Special Education Programs
SUBJECT: **Complaint Management Procedures under Part B of the Individuals with Disabilities Education Act (Part B)**

A. Introduction

The purpose of this memorandum is to call your attention to the requirements for State complaint procedures that are set out in §§300.660-300.662 of the final Part B regulations, as published on September 29, 1992. We wanted to highlight these procedures, because they contain a number of **additional** requirements that State education agencies (SEAs) must implement -- which were not required in past years, when the complaint procedures were included in the Education Department General Administrative Regulations (EDGAR).n1

n1. The State complaint procedures were previously included at 34 CFR 76.780-782. When certain amendments were made to EDGAR on July 8, 1992 (57 FR 30328), that regulatory action removed the complaint procedures

from EDGAR and added identical requirements to the Part B regulations at §§300.670-300.672. However, when the final Part B regulations were published on September 29, 1992 (57 FR 44794), the State complaint procedures were renumbered as §§300.660-300.662, and changes were made in the procedures, based on comments received on the August 19, 1991 Notice of Proposed Rulemaking (NPRM).

The memorandum also includes information about (1) the relationship between the complaint resolution and due process hearing procedures in the Part B regulations, (2) the SEA's general supervisory responsibilities with respect to those procedures, (3) the process that the Office of Special Education Programs (OSEP) will follow in responding to a written complaint that is submitted directly to OSEP from a complainant within a State, or is referred by the Office for Civil Rights (OCR) or a member of Congress, and (4) OSEP's revised procedures for monitoring each SEA's implementation of the State complaint requirements.

B. State Complaint Procedures

The following is a description of the requirements for State Complaint Procedures, as set out in §§300.660-300.662 (The new requirements are capitalized and **BOLDED**):

1. Adoption of State Complaint Procedures; Filing a Complaint. (§§300.660 and 300.662)
   Section 300.660 requires each SEA to adopt written procedures for:
   a. Resolving any complaint that meets the requirements of §300.662 n2 by -

n2. Section 300.662 provides that an organization or individual may file a signed written complaint that includes (1) a statement that a public agency has violated a requirement of Part B, and (2) the facts on which the statement is based.

Although an SEA is not required to resolve complaints that do not meet the requirements of §300.662 (e.g., telephone complaints or other oral complaints), SEAs may elect to have procedures for transcribing oral complaints into written form if they choose to do so.

(1) Providing for the filing of a complaint with the SEA; and

(2) **AT THE SEA'S DISCRETION, PROVIDING FOR FILING THE COMPLAINT WITH A PUBLIC AGENCY, AND THE RIGHT TO HAVE THE SEA REVIEW THE PUBLIC AGENCY'S DECISION ON THE COMPLAINT.**

b. **INFORMING PARENTS AND OTHER INTERESTED INDIVIDUALS ABOUT THE COMPLAINT PROCEDURES IN §§300.660-300.662.**

2. Minimum State Complaint Procedures (§300.661)

Section 300.661 requires the SEA to include the following in its complaint procedures:

a. A time limit of 60 calendar days after a complaint is filed under §300.660(a) to --

(1) Carry out an independent on-site investigation if the SEA determines that such an investigation is necessary;

(2) **GIVE THE COMPLAINANT THE OPPORTUNITY TO SUBMIT ADDITIONAL INFORMATION, EITHER ORALLY OR IN WRITING, ABOUT THE ALLEGATIONS IN THE COMPLAINT;**

(3) **REVIEW ALL RELEVANT INFORMATION AND MAKE AN INDEPENDENT DECISION AS TO**

WHETHER THE PUBLIC AGENCY IS VIOLATING A REQUIREMENT OF PART B; AND

(4) **ISSUE A WRITTEN DECISION THAT ADDRESSES EACH ALLEGATION IN THE COMPLAINT AND CONTAINS - (i) FINDINGS OF FACT AND CONCLUSIONS, AND (ii) THE REASONS FOR THE SEA'S FINAL DECISION.**

b. An extension of the time limit under §300.661(a) only if exceptional circumstances exist with respect to a particular complaint.

c. **PROCEDURES FOR EFFECTIVE IMPLEMENTATION OF THE SEA'S FINAL DECISION, IF NEEDED, INCLUDING TECHNICAL ASSISTANCE ACTIVITIES, NEGOTIATIONS, AND CORRECTIVE ACTIONS TO ACHIEVE COMPLIANCE.**

d. The right of the complainant **OR THE PUBLIC AGENCY** to request the Secretary to review the SEA's final decision.

C. Relationship Between the Complaint Management and Due Process Hearing Systems

Under the Part B regulations, parents of children with disabilities have two separate means available to them for resolving disputes with public agencies concerning the education of their children -- i.e., (1) the complaint management system required in §§300.660-300.662 (which is the subject of this memorandum), and the impartial due process hearing system required in §§300.506-300.513.

The State complaint procedures are available for resolving any complaint that meets the requirements of §300.662, including (1)

complaints that raise systemic issues, and (2) individual child complaints that are filed by parents. Thus, parents may use these procedures -- in lieu of the due process hearing system -- to resolve disagreements with public agencies over any matter concerning the identification, evaluation, or educational placement of their child, or the provision of a free appropriate public education (FAPE) to the child.

It is impermissible under Part B for an SEA (1) to have a procedure that removes complaints about FAPE or any other matter concerning the identification, evaluation, or educational placement of a particular child from the jurisdiction of its complaint management system, or (2) to advise or require parents to request a due process hearing before the SEA can initiate a complaint investigation. Thus, whenever an SEA receives a complaint that a public agency is violating a requirement under Part B, including any matter for which parents could request a due process hearing, the SEA must resolve the complaint within 60 calendar days, using the procedures outlined in B, above.

In some cases, a written complaint may be received that is also the subject of a due process hearing, or may contain multiple issues, of which one or more may be part of that hearing. In those cases, the State must set aside any part of the complaint that is being addressed in the due process hearing, until the conclusion of the hearing. However, any issue in the complaint that is not a part of the due process action must be resolved within the 60 calendar day timeline using the SEA's complaint management procedures.

D. SEA Implementation of Complaint Management Requirements--As A General Supervisory Responsibility

As part of its general supervisory responsibilities under section 612 of the Act (§300.600 of the regulations), each SEA must implement complaint resolution procedures in a manner that is

fully consistent with the requirements of §§300.660-300.662. Thus, among other things, the SEA must ensure --

1. That parents and other interested parties (including public agencies) are informed about the complaint resolution procedures; and
2. That all actions required in §300.661(a) for reviewing and resolving a complaint -- including issuing a written decision that addresses each allegation in the complaint -- are completed within the required time limit of 60 calendar days.

The State complaint procedures, which are under the direct control of the SEA, have the potential for providing a less costly and more efficient mechanism for resolving disputes than is possible under the impartial due process hearing system. For these reasons, effective implementation of the complaint management procedures will have a positive impact on both parents and public agencies.

E. OSEP's Process for Responding to Direct Complaints

Because complaint resolution falls within the purview of the SEA's general supervisory responsibility, whenever OSEP receives a direct complaint from a complainant or as a referral from OCR or the Congress, we will continue to refer the complaint to the SEA for resolution -- using the State's complaint management procedures required in §§300.660-300.662. In addition, and beginning immediately, OSEP will initiate the following procedures and timelines:

1. Upon receipt of a written complaint, OSEP will (a) inform the complainant that we have referred the complaint to the SEA, and (b) transmit the complaint to the SEA.
2. As appropriate, the DAS State contact will call the complaint specialist in the SEA to discuss the complaint, and provide additional background or information, if any

exists, or otherwise clarify any requirements for resolving the complaint.

3. If a complaint raises the possibility that there may be a violation of Section 504 of the Rehabilitation Act of 1973, we will also refer the complaint to OCR to conduct its own investigation. However, the SEA still must implement its own complaint resolution procedures in accordance with the requirements of §§300.660-300.662.

4. OSEP will request a copy of the final decision that the SEA provides to the complainant within 60 calendar days of the SEA's receipt of the complaint. If exceptional circumstances exist that result in the granting of an extension of the 60 calendar day timeline (see §300.661(b)), the SEA must (a) inform the complainant, in writing, about the extension (including its purpose and length), and (b) submit a copy of that explanation to OSEP.

5. Upon receipt of the SEA's written decision, OSEP will review the decision to ensure that it (a) addresses each allegation in the complaint, as required in 300.661(a)(4), and (b) meets all timeline and procedural requirements.

6. Following OSEP's review of the SEA's final report, the DAS State contact will notify the SEA' s complaint specialist about the status of the complaint (e.g., that (a) OSEP considers the complaint to be closed, or (b) if there appear to be problems with the SEA's resolution of the complaint, any additional steps that the SEA must follow to resolve the complaint).

F. OSEP's Revised Process for Monitoring Each SEA's Implementation of the Complaint Requirements

In the past, OSEP's monitoring of each SEA's implementation of the complaint requirements was conducted mainly through the monitoring staff's periodic on-site visit to the State. However,

because of the important role that effective complaint management plays -- both for parents and for the SEA in meeting its general supervisory responsibilities -- we have determined (1) that OSEP's monitoring of an SEA's complaint management must be an on-going process, and (2) that, for the most part, this area can be effectively monitored on an off-site basis.

Thus, OSEP will be making the following changes in its procedures for monitoring each State's compliance with the complaint management requirements:

1. **SEA's Complaint Procedures.** We will ask each SEA to submit its current complaint management procedures for review by OSEP's monitoring staff, to ensure that the procedures are complete and include all of the requirements of §§300.360-300.662.n3

n3 Any State that was (will be) monitored during the current (1993-94) cycle will not have to provide its complaint procedures, because a copy of those procedures were (will be) reviewed as part of OSEP's on-site review.

2. **Complaint Logs and Other Information.** We will be requesting each SEA to submit, on at least an annual basis, the SEA's Complaint Log, including the following information on each complaint: (1) timeline data (including, date received, date complainant contacted, and date written decision issued), (2) subject of complaint, (3) results, (4) number of complaints appealed to the Secretary, and (5) other information, as appropriate. We also will ask for similar information on the due process hearings conducted each State.

3. **Parent Centers and State P&A Agencies.** OSEP monitoring staff will take steps to establish a link with staff in the Parent Training and Information Center and the Protection and Advocacy agency within each State -- to determine their perceptions about the effectiveness of,

and any problems with, the State's complaint resolution and due process hearing systems.

OSEP's analysis of the data and information from the above sources -- including a review of the SEA's ability to respond effectively to OSEP-referred complaints -- will enable our staff to determine (1) the compliance status of each State's complaint management system, and (2) if there is a pattern of concern raised through the complaint resolution process. In the event that potential problems are identified, we will validate our information and conclusions. Then, as appropriate, we will work with the SEA to assist in correcting those problems, and, if necessary, take other steps to ensure that required corrective actions are implemented.

If you have comments or questions about this memorandum, or if we can be helpful to you and your staff in meeting the complaint management and other Part B requirements, please feel free to call or write your State contact in OSEP's Division of Assistance to States.

Honorable Charles S. Robb
United States Senator
Old City Hall
1001 East Broad Street
Richmond, VA 23219

Digest of Inquiry

(June 11, 1990)

-May a state educational agency (SEA) suspend its investigation of a complaint until the resolution of due process proceedings?

Digest of Response

(January 16, 1991)

SEA May Suspend Investigation Until Hearing Resolution

If a complaint has been filed with the state educational agency (SEA) on an issue pending in due process proceedings, the SEA may hold the complaint in abeyance until completion of the hearing. The SEA must proceed, however, with its investigation of any matters not at issue in the hearing.

Text of Inquiry

Enclosed is correspondence I received in reference to a matter involving your agency. Your assistance with the requests and concerns expressed in this case would be greatly appreciated.

It would be very helpful if you would reply in duplicate and return the enclosure. In your reply, please reference [ ].

Your correspondence should be mailed to my office at the address indicated above.

Again, thank you for your assistance.

Enclosure

You sent a letter to the United States Department of Education on behalf of [ ], a special education student. On May 10, 1990, you

received a response back from Dr. Davila. You sent me a copy of Dr. Davila's response, and I thank you very much for sharing it with me.

Enclosed is my response to Dr. Davila which recounts the nightmare we are going through with the department. Please read the enclosed letters and help this family. A precious, ten year old, handicapped child's education is at stake here.

Enclosure

We are in receipt of your letter to Senator Chuck Robb in this case. After months of complaints the Virginia Department of Education has finally decided to open an investigation on Fairfax County Public Schools ("FCPS") not providing [ ] an IEP since December 18, 1990! (Attachment 1). In the interim FCPS filed a due process against the [ ] to skip the IEP process and procedural safeguards. They wanted to exclude the parents participation and consent for a change of educational placement. They want a hearing examiner to decide [ ]'s educational placement which was admittedly decided by FCPA prior to the IEP process!

Now that FCPS has filed due process, the Virginia Department of Education has decided finally it would investigate but it will wait until after the due process even though it is on a completely different subject!

Dr. Davila, this case is complicated and a nightmare. Judy Schrag promised to investigate and call me back two weeks ago. She didn't. For two months we have asked Ray Minor, your investigator, for a meeting to no avail. Please allow us an appointment to speak with you. Your immediate intervention is needed. We regard the Virginia Attorney General's opinion that the 60 day time line can be ignored when the parties are in due process even on different issues as a violation of the law.

Text of Response

In response to your referral and the materials you sent this office relative to the [ ] case, I am pleased to provide the following information for your review and consideration. [ ] wrote to you

concerning the decision of the Virginia Department of Education to delay investigating her complaint because of a pending due process hearing.

Complaint procedures under the Education Department General Administrative Regulations (EDGAR), at 34 CFR Sections 76.780-76.782, require States to investigate and resolve any complaint alleging that a State or a subgrantee has violated a Federal statute or regulations that apply to a covered program.

Under Part B of the Individuals with Disabilities Education Act, formerly entitled the Education of the Handicapped Act, parents of children with disabilities have a right to request a due process hearing on any issue concerning the identification, evaluation or placement of children with disabilities, or their right to a free appropriate public education.

This office recognizes that State educational agencies (SEAs) often receive complaints that appear to involve disagreements between parents and school districts over the identification, evaluation, educational placement, or the provision of a free appropriate public education to a particular child. The EDGAR complaint procedures require the SEA to resolve any complaint it receives, regardless of whether the complaint concerns a matter that would also be an appropriate subject for a request for a due process hearing.

There are some circumstances, however, when it may be appropriate for the State to hold a complaint in abeyance on a specific issue. When a complaint has been filed with the State on an issue that is also the subject of a pending due process hearing, the State may suspend its investigation of that issue until the conclusion of the due process procedures. However, the State may not hold in abeyance issues that are included in the complaint, but that are not the subject of the due process hearing.

The Virginia State Department of Education is in the process of revising its complaint management procedures to ensure that they are consistent with these requirements.

Please let me know if I can be of further assistance.

Robert R. Davila
Assistant Secretary

Inquiry by: Bob VanOsdol
Protection & Advocacy Agency for Development Disabilities
9726 East 42nd Street
Tulsa, Oklahoma 74145

Digest of Inquiry
(July 5, 1978)

(1) Does FAPE, Reg. 121a.4, require that parents of handicapped child be reimbursed for actual transportation costs where state statute provide for maximum reimbursement to school districts of six cents/mile?

(2) Is parental consent required for alternative placements, Reg. 121a.552?

(3) Where five months after evaluation of a child as handicapped, LEA has not completed IEP, is LEA in noncompliance with Reg. 121a.320 (definitions of priorities), Reg. 121a.342 (when IEPs must be in effect), Reg. 121a.346 (content of IEP)?

(4) Do the due process requirements, Regs. 121a.500-514, apply before a special education class has been established?

(5) Does a State statute giving Superintendent of State Institutions guardianship of children in state facilities comport with Reg. 121a.514 requirements for surrogate parents?

Digest of Response
(October 12, 1978)

-Reg. 121a.13(13) requires transportation to be provided as a related service; disagreements over source of or reimbursement for transportation could be substance for due process.

-Reg. 121a.504(b) requires parental consent for initial placement; if school determines placement should be changed, Reg. 121 a.505 provides detailed description of required written notice.

-Reg. 121a.343(c) requires IEP meeting within 30 days of determination of need for special education; Reg. 121a.342(b)(13) provides that IEP is to be implemented as soon as possible after the IEP meeting.
-Reg. 121a.506 provides that parent (or surrogate) or agency may initiate due process hearing in any matter regarding identification, evaluation, placement or provision of services.
-Although generally public agency may designate surrogate in any way permitted under State law, requirement of Reg. 121a.514(c)(2)(c) that surrogate has no interest that conflicts with child's, of Reg. 514(d)(1) that surrogate has knowledge and skills to ensure adequate representation, and of Reg. 121a.10 that State may not be regarded as "parent," requires appointment of surrogate parent pursuant to requirements of Reg.121a.514.

Text of Inquiry

Transportation:

1. In Oklahoma, under the State LAW Article XIII, it is indicated that the State shall reimburse a school district at the rate of six (6) cents per mile. Many school districts have paid only this amount to parents when the parents are requested by the school district to transport the handicapped child. Other school districts have refused any payment to the parents. This is not adequate.

In keeping with P.L. 94-142, it would seem under Reg. 121a.4 that a free appropriate public education would mean that if the school district refuses to provide appropriate transportation that said school district must reimburse parents for their actual expenses. If the school district must reimburse parents actual expenses, then the school district should be required to purchase appropriate transportation, i.e. taxi, private sources, etc., through contracts, or said school district should be required to purchase buses, automobiles or other necessary devices that are fully equipped to meet the individual needs of each handicapped child.

Placement of a Child:

2. The State Department of Education has indicated to us that a school district may place a child in any of several educational placements, i.e. cooperatives, regional centers, institutions, etc. It is our opinion in this argument with the State Department of Education that they are in violation of P.L. 94-142, Reg. 121a.552 and also the Rehabilitation Act of 1973. We do not believe a school district may place a child in another setting without parental consent.

IEP:

3. A local school district evaluated a child in February 2, 1978, but to this date this school district has not completed the IEP. This child is a low incidence multihandicapped child, classified as trainable. This child has been in a regular kindergarten class for two (2) years, even though Oklahoma has a law under Article XIII, Sec. 162 stating there shall be no minimum age for these children. Therefore, this child should have been served since the age of 0. (Sec. 13-101, HB 1155, 1971). It would seem that the local school district and the State of Oklahoma would be in noncompliance under P.L. 94-142, Reg. 121a.320 and also Reg. 121a.342, Reg. 121a.346, as well as the laws of Oklahoma.

Due Process Hearing:

4. We have been told by the State Department of Education that we cannot have parents request hearings until a special education class has been established. We had a due process hearing on a child that was in a regular program. Since this was toward the completion of the school year, we stated that time was a factor and the placement would be required for September 1978. We won the hearing. The school appealed. The State Department of Education, with the Director of Special Education as the Chairman, stated there was never any reason for the original hearing. Is it possible to have a hearing on a child that is still in a regular program but has been evaluated as needing special education?

Surrogate Parents:

5. The State of Oklahoma has laws giving the State Superintendent of State Institutions guardianship over all children entered into that facility. (Oklahoma Laws 56 O.S. Sec. 311 and 10 O.S. Sec. 1145)

Is the State of Oklahoma in non-compliance according to P.L. 94-142, Reg. 121a.514.

Text of Response

I am responding to your concerns in the original order in which they were presented in your letter.

Transportation:

As you know, transportation must be provided as a "related service," if a child needs transportation in order to benefit from special education. Neither the statute nor regulations set a reimbursement schedule for state and local education agencies to follow.

Transportation issues would necessarily be a part of the child's individualized education program which is developed jointly with the LEA and the parents or guardians of the child as required by Part B. Should the parents or guardians, as well as the local education agency disagree with the IEP (i.e., the adequateness of the reimbursement allowance; the source of the transportation--school or contracts, etc.) this disagreement could become substance for a due process hearing and subject to the decision of an impartial hearing officer appointed in the matter until all appeals have been exhausted or resolved.

Placement of Child

Reg. 121a.504(b) states that "(1) Parental consent must be obtained before: . . . initial placement of a handicapped child in a program providing special education and related services. "

After the initial educational placement, should the school determine that an alternate placement would best serve the needs of the child (as stated in his or her IEP) the school must provide the parents with prior

written notice of the proposed change in placement. Reg. 121 a.505 describes in detail the required contents of any such notice.

After receiving such a notice, any unresolved concerns the parents might have could become substance for a due process hearing.

IEP:

You are correct in stating the child's IEP should be completed. Reg. 121a.343(c) states that once a determination has been made that a child needs special education and related services, an IEP meeting must be held within 30 days. The regulations go on to state in Reg. 121a.342(b)(2) that an IEP "be implemented as soon as possible following the meetings" mentioned above.

Once again, should a child not have an IEP in operation within the time frame mentioned above, the parents may initiate a due process hearing in efforts to secure an IEP for their child.

Due Process Hearing:

A due process hearing may be requested at any time by a parent or school in matters which affect the identification, evaluation, or placement of the child or the provision (emphasis added) of a free appropriate public education to the child (Reg. 121a.504(a)(1)). One point I must stress, is that parents and or guardians and schools are the only two parties (with the exception of surrogate parents) with the right and responsibility for initiating due process procedures.

Surrogate Parents:

Reg. 121a.514(c)(1) does state that "the public agency may select a surrogate in any way permitted under State law." However, the public agencies are charged with additional responsibilities in that, the surrogate parents selected must meet the criteria of the EHA/Part B Regulations. Some of these criteria include:

> Reg. 121 a.514(c)(2)(i)
>
> "Has no interest that conflicts with the interest of the child he or she represents, and

Reg. 121a.S14(d)(1)

"A person assigned as a surrogate may not be an employee of a public agency which is involved in the **education or care** (emphasis added) of the child."

Lastly, Reg. 121a.10 (the definition of "parent") was written to make it clear that the "State" could not be regarded as the parent. If the child is ward of the State, there is no "parent" to represent his or her interests, and a surrogate parent must be appointed, according to the requirement in Reg. 121a.514.

William D. Tyrrell
Chief
State Policy Development Section
Bureau of Education for the Handicapped

Inquiry by: David Kirk, Administrator
Burlington United Methodist Home
for Children and Youth, Inc.
P.O. Box 96
Burlington, WV 26710

Digest of Inquiry
(October 28, 1980)

Are employees of a private, non-profit residential care facility ineligible to serve as surrogate parents under either the "non-employee" requirements of Reg. 300.514(d) or the "conflict of interest" provision of Reg. 300.514(c)(2)(i)?

Digest of Response
(November 21, 1980)

Surrogate Parents:

Employees of a private child care facility are not prevented from serving as surrogate parents under the "non-employee" requirements because the facility is not a "public agency" under Reg. 300.11, or a public agency involved in the education or care of the children under Reg. 300.514(d)(1).

Surrogate Parents:

An employee of a private care facility may have a conflict of interest as a surrogate parent if he or she is put in the position of advocating an educational program for a child which could result in a financial loss to the facility for which he or she works. Also, Federal requirements set minimum acceptable standards to which all States must adhere; any State may adopt stricter standards for surrogate parents, at its own discretion.

Text of Inquiry

This is in reference to Reg. 121a.514 Surrogate Parents, Federal Register, Volume 42, No. 163 Tuesday, August 23, 1977. I am the

Administrator of the Burlington United Methodist Home for Children and Youth, Inc., a private, not-for-profit, voluntary, residential child care agency. We serve children and youth in residence who are either placed privately or by the West Virginia Department of Welfare. We are not a school. we receive no funds through the Department of Education or the local school board for operation of the agency. We have a purchase of service contract with the Department of Welfare and receive per diem payments for the children and youth they place in our care. All the staff are employed by the agency. They are not employees of the State or any other governmental agency. We are designated a 501(3)(c) agency (non-profit) by the Internal Revenue Service.

I am saying all this as background for a question relating to policy. The State Department of Education, Special Education Division, has interpreted the section on Surrogate Parents to exclude persons from the staffs of agencies such as Burlington being designated surrogate parents. They contend that we are a public agency and, therefore, as employees of a public agency involved in the education or care of a child, cannot be a surrogate parent. I do not believe agencies such as Burlington United Methodist Home for Children and Youth, Inc. are or can be designated Public Agencies. The definition of a public agency as stated in Reg. 121a.11 of the Federal Register referred to earlier in this letter makes it clear to me we cannot be considered a public agency. To quote:

> "121a.11 Public Agency--As used in this part, the term 'public agency' includes the State educational agency, local educational agencies, intermediate educational units, and any other political subdivision of the State which are responsible for providing education to handicapped children. (20 U.S.C. §1412(2)(B); §1412(6); §1413(a)."

We do not fall into any of the categories listed in this definition. Therefore, I do not believe we can be classified as a public agency.

As an agency involved in the care of children and youth, we act as an advocate for them in every phase of their life, including representing them to the school system and protecting their rights. It is

our responsibility to see that all the children and youth in our care receive quality education services at every level including, and particularly, special education services. Since we do not operate a school, are not a school, and receive no educational funds from State or Federal sources, I cannot see how it could be interpreted that our representation of a child would be a conflict of interest.

In light of the above discussion, I would like a policy interpretation from you in regard to the issue. This is not for my benefit only. I am the Chairperson of the Public Affairs Committee of the West Virginia Child Care Association, and on their behalf I am seeking this clarification and interpretation.

I have been in touch with Ms. Connie Batino of the West Virginia Department of Education, Special Education Division, concerning this matter. I have asked her for a statement explaining the State's position. I am sending her a copy of this letter.

I appreciate your attention to this matter. I you wish to discuss it in more detail, please feel free to call me at 304-299-3511.

Text of Response

I am writing in response to the questions you raised in your letter of October 28, 1980 with regard to the surrogate parent requirement of P.L. 94-142. In this letter you ask whether employees of your agency are excluded from acting as surrogate parents for the children in the care of your agency under the "non-employee requirement" (Reg. 300.514(d) or the "conflict of interest" requirement (Reg. 300.514(c)(2)(i) of the P.L. 94-142 regulations.

Because yours is a private child care institution, it would not be a "public agency" under Reg. 300.11 or a "public agency which is involved in the education or care of the child" under Reg. 300.514(d)(1). Your employees would not be prevented from serving as surrogate parents on this basis under Federal Regulations.

The question of conflict of interest is more complicated because it must be determined on a case-by-case basis. The Office of Special Education (OSE) has not specifically defined what constitutes a conflict

of interest. However, in a policy paper currently being prepared by OSE on surrogate parents, the following standard is being considered.

> "Determinations of conflict of interest must be made on a case-by-case basis. The following are guidelines to follow in determining when a conflict of interest exists: A person would have a conflict of interest if he/she held a job or other position (e.g. school board member) that might restrict or bias his/her ability to advocate for all of the services required to insure a free appropriate public education for a handicapped child. A surrogate parent must be free from institutional bias regarding the education of the child and from the possibility of administrative retaliation for the faithful execution of his/her rights and duties as a surrogate parent."

An employee cannot be expected to advocate freely against the interests of his/her employer. For example, an employee of a private care facility would have a conflict of interest if he/she could be put in the position of advocating an educational program for a child in that facility which could result in a financial loss to that facility.

Finally, you should realize that West Virginia may impose more restrictive standards for the qualifications of surrogate parents than those in the P.L. 94-142 regulations. The Federal requirements in this regard are minimum acceptable standards to which all of the States must adhere. Any State may choose to adopt stricter standards at its own discretion.

If you have any further questions on this or any other issue regarding P.L. 94-142, please let us know.

Shirley Jones, Acting Chief
Policy Development Branch
Office of Special Education

Edmonds (WA) School District No. 15
December 9, 1980

Complainant alleged that school district improperly evaluated son's special education needs; improperly placed student in pre-school program; failed to properly reevaluate student; and denied parent right to hearing regarding son's educational placement.

HELD, district did not violate §504. First, tests and materials used to evaluate student were validated, administered by trained personnel and broad enough in scope to assess areas of need. Second, placement in pre-scho9ol program was appropriate since placement decision was based on information from variety of sources and student's performance was assessed at least semi-annually. Moreover, pre-school program was only one offered by district, adequately addressed his needs, was in most integrated setting possible and was close to student's home. Third, district evaluated student prior to initial placement and reevaluated him one year later at complainant's request. Finally, State law provides that right to made educational decisions belongs to custodial parent alone. Although § 504 would require that noncustodial parent have access to student's records, teacher, school officials, and attend hearings or meetings relating to IEPs, district is under no obligation to convene hearing at request of complainant, noncustodial parent.

Dr. Robert H. Woodruff
Superintendent
Edmonds School District No. 15
3800 196th S.W.
Lynnwood, WA 98036

Re: No. 10801049

The Office for Civil Rights (OCR) has completed its investigation of the above-referenced complaint. The complainant, [ ] alleged that Edmonds School District discriminated against his son in violation of §504 of the

Rehabilitation Act of 1973. Section 504 prohibits discrimination based on handicap by recipients of Federal financial assistance.

Specifically, the complainant alleged that:

(1) Edmonds School District improperly evaluated his son's special education needs;

(2) Edmonds School District improperly placed his son in Maplewood Elementary School's pre-school program;

(3) Edmonds School District failed to properly reevaluate his son's special education needs;

(4) Edmonds School District denied him the right to a hearing regarding his son's educational placement.

Our investigation revealed no evidence of civil rights violations in the activities the complainant specified. Our investigation revealed that:

(1) Edmonds School District accepted and utilized, among other information, evaluation of the complainant's son conducted by the Child Development and Mental Retardation Center (CDMRC) at the University of Washington, Seattle, Washington. The tests and other materials used to evaluate the complainant's son were broad-based and tailored to assess his specific areas of educational need. Standard, validated tests were used, and the tests were administered by trained personnel in the Clinical Training Unit of CDMRC;

(2) The multi-disciplinary team who placed complainant's son in Maplewood Elementary School's pre-school program included persons knowledgeable about him, the meaning of his evaluation data and placement options. The placement decision was based on information from a variety of source, The pre-school program offered at Maplewood Elementary School is the only pre-school program which Edmonds School District No. 15 operates. The program is for handicapped children only

and addressed the identified educational needs of complainant's son.

In addition, the complainant's son's performance in pre-academic skills has been formally assessed semiannually since his initial placement and his individualized education plans (IEPs) have been reviewed annually and revised as necessary. His IEP for the 1980-81 school year is consistent with the programming he received the two previous years. Finally, the complainant's son placement in the Maplewood program for school years 1978-79 and 1979-80, and his present placement, have been in the most integrated setting appropriate to his needs and have taken into consideration the program's proximity to his home.

(3) The complainant's son was properly evaluated in the fall of 1978 by CDMRC prior to initial placement in special education and was reevaluated by CDMRC in the fall of 1979 at the complainant's request. The district accepted and utilized the results of the 1979 CDMRC reevaluation in the complainant's son's educational programming. Though there is some dispute over whether reevaluation was warranted in 1979, we found no evidence that the district was requested to reevaluate the complainant's son. In addition, the evidence did not indicate that the complainant incurred any finaancial liability for the 1979 CDMRC evaluation.

(4) Edmonds School District denied the complaint the right to a hearing regarding his son's educational placement. The district's action was declaratory judgment by the Snohomish County Superior Court. The court decided that the district was not obligated to provide a hearing to the complainant under the provision of State law

governing special education (RCW 28A.13) and Federal law governing the education of handicapped children (20 U.S.C. § 1401 et seq.). In the instant case OCR concurs with the court's judgment. In addition, the issues that would be raised in a hearing have been addressed by issues #1-3 above.

As you know, our Headquarters in Washington, D.C. , reviewed our investigative findings. A copy of their comments is attached for your information.

This letter of findings is not intended nor should it be construed to cover any other issues regarding compliance with §504 of the Rehabilitation Act of 1973 that may exist and are not discussed herein.

OCR is obligated under the Freedom of Information Act to release this letter and other information about this case upon request by the public. In the event we receive such a request, we will make every effort to protect information contained herein that identifies individuals or that, if released, would constitute an unwarranted invasion of privacy.

Thank you very much for the cooperation and assistance that you, Inara Horton, and your Maplewood staff extended my staff during our investigation of this complaint.

If you have any questions, please feel free to contact Felix Sandoval, Director, Elementary and Secondary Education Division, or Steve Kikuchi, Branch Chief, at (206) 442-1930. 06) 442-1930.

Gary D. Jackson
Regional Director
Office for Civil Rights
Region X

[Ed. Note: The following is an interpretation from OCR, Washington, D.C., Region X on the right of a noncustodial parent to request a hearing concerning a child's special education needs.]

We have reviewed the [ ] v. Edmonds School District No. 15 case. The main issues are whether: (1) a handicapped child's special education needs were properly evaluated and reevaluated; and (2) the district is required to convene a hearing concerning the child's special education needs upon the request of a noncustodial parent.

Background

The father and mother of [ ], a six-year old _____ disabled child were divorced and the court awarded the mother custody of the child. The father (the noncustodial parent) filed a complaint alleging that: (1) the Edmonds School District improperly evaluated his son's special education needs and placed him in the Maplewood Elementary School's preschool program; (2) the district did not properly evaluate his son's special education needs; and (3) the district denied him the right to a hearing concerning his son's special education needs in violation of the Section 504 regulation.

Investigation revealed that Washington State law gives * right to make educational decisions to the custodial parent as in the instant case is the mother, and that the Snohomish County Superior Court held that the Edmonds School District was under no legal obligation to convene a hearing at the request of the noncustodial parent.

Policy Clarification

From the investigative report it is clear that [ ] was properly evaluated, reevaluated and placed in a proper educational setting. The Washington State law clearly indicates that educational decisions are the sole province of the custodial parent and the Snohomish County

Superior court's decision disclaims the noncustodial parent's rights to a hearing by the school district. The spirit and letter of the appropriate section of the 504 regulations have been adhered to as indicated in the investigative report.

It is our conclusion that the complainant (the noncustodial parent) may have access to his son's records, teachers, and school officials, and may attend meetings and hearings that relate to the development or modification of his individual Education Program. However, the right to make the final decision as to the child's education placement and to request a hearing by the school district into these same general matters is the sole province of the custodial parent.

COMPILATION OF STATE REGULATIONS

The following is a compilation of state statutes and administrative regulations relating to EDGAR complaint procedures and §1415 due process hearing procedures. Every attempt was made to obtain all such information for all such states, but because of time limitations and the fact that much of this material is uncodified and contained only in state plans filed with the USDOE, this Appendix is at present incomplete, and can only give a representative sample (35 of the 50 states).

Alabama:

A. Impartial Due Process Hearing Procedure: (Ala.Admin. Code 290-080-090.10(4)(c)(1)(i) (1993 Supp.))

"(i) The parent(s) or a designated representative or an official from the education agency may request an Impartial Due Process Hearing by writing to the state Superintendent of Education, Attention: Division of Special Education Services, at the following address: 3346 Gordon Persons Building, 50 Noth Ripley Street, Montgomery, Alabama 36130-2101."

B. EDGAR Complaint Procedure:

Not available at the time of compilation of this Appendix.

Arizona: Not available at the time of compilation of this Appendix.

Arkansas:

A. Impartial Due Process Hearing Procedure: (Uncodified, contained in the State Plan filed with the United States Department of Education)

"Section Two: Reasons for Impartial Due Process Hearing

1. Parents, guardians or surrogate parents may request a hearing about any issue listed in 34 Code of Federal Regulations 300.504(a)(1) and when the public agency:

a. proposes to initiate or change the identification, evaluation or educational placement of the child or the provision of a free and appropriate public education to the child;

b. refuses to initiate or change the identification, evaluation or educational placement of the child or the provision of a free and appropriate public education to the child.

2. Public educational agency officials may initiate a hearing when parents, guardians or surrogate parents:

a. refuses to give consent for the public educational agency to initiate or change the identification, evaluation or educational placement of the child or the provision of a free and appropriate public education to the child."

B. EDGAR Complaint Procedure:

"**A. GENERAL**

In compliance with 34 Code of Federal Regulations (CFR) 300.660-300.662 and 302.64-302.66, the Arkansas Department of Education, Special Education,

hereby establishes policy and procedures for the management of complaints received from an organization or individual alleging a violation of requirements of Public Law (PL) 94-142 as amended, the Individuals with Disabilities Education Act, or PL 89-313.

B. FILING A COMPLAINT

1. Form An organization or individual may file a written signed complaint with the Arkansas State Education Agency (SEA), or the complaint may be made in person by recorded deposition or statement. Such complaint may be communicated directly or indirectly via other state or federal agencies."

California:

A. Impartial Due Process Hearing Procedure: (2 CCR 60550)

"§56501. **Procedural Safeguards**

(a) The due process hearing procedures prescribed by this chapter extend to the parent, as defined in Section 56028, a pupil who has been emancipated, and a pupil who is a ward or dependent of the court or for whom no parent can be identified or located when the hearing officer determines that either the local educational agency has failed to appoint a surrogate parent as required by Section 7579.5 of the Government Code or the surrogate parent appointed by the local educational agency does not meet the criteria set forth in subdivision (e) of Section 7579.5 of the Government Code, and the public education agency involved in any decisions regarding a pupil. The appointment of a surrogate parent after a hearing has been requested by the pupil shall not be cause for dismissal of the hearing request.

The parent and the public education agency may involved may initiate the due process hearing procedures prescribed by this chapter under any of the following circumstances: ... ."

B. EDGAR Complaint Procedure: (2 CCR 4600)

"**§4600 Uniform Complaint Procedures; General Definitions**

(b) 'Complainant' means any individual, including a person's duly authorized representative or an interested third party, public agency or organization who files a written complaint alleging violation of federal or state laws or regulations, including allegations of unlawful discrimination in programs and activities funded directly by the state or receiving any financial assistance from the state.

§4610 Purpose and Scope

(b) This Chapter applies to the following programs administered by the Department: ... (vii) Special Education programs established pursuant to Education Code sections 56000 through 56885 and 59000 through 59300."

Colorado:

A. Impartial Due Process Hearing Procedure: (1 Colorado Code of Regulations 301-8, 2220-R-6.03(2))

"**§6.03 Due Process Hearings**

(2) A parent, administrative unit, or a district that is a member of an administrative unit may request a due process hearing on any matter set forth above. Not later than 45 days after receipt of a written request for a

hearing, a final decision must be reached and a copy of that decision mailed to the parties to the hearing unless the timeline is appropriately extended."

B. EDGAR Complaint Procedure: (Uncodified, contained in the State Plan filed with the United States Department of Education)

"§1280 PROCEDURE FOR RESOLVING COMPLAINTS ABOUT FEDERALLY FUNDED PROGRAMS ADMINISTERED BY THE COLORADO DEPARTMENT OF EDUCATION

2. A complaint may be filed by an organization or individual aggrieved by an action of a program participant in a program administered by CDE."

Connecticut:

A. Impartial Due Process Hearing Procedure: (Connecticut General Statutes, §10-76h)

"§10-76h. Special education hearing and review procedure. Mediation of disputes.

(a) A parent or guardian of a child requiring special education, or an emancipated minor requiring special education, or a pupil eighteen years of age or older requiring special education under sections 10-76a to 10-76g, inclusive, or a surrogate parent appointed pursuant to section 10-94g, or the commissioner of children and youth services or a designee of said commissioner, on behalf of any such child in the custody of said commissioner, may request, in writing, of the local or regional board of education or the unified school district

responsible for providing such special education a hearing to review: ... ."

B. EDGAR Complaint Procedure: (Uncodified, contained in the State Plan filed with the United States Department of Education)

"Complaint Resolution Process
(1)(A) Complaint Reception
A Complaint must be filed in writing and may be filed by parents, advocates, attorneys or other interested parties. The Bureau may initiate a complaint based on information suggesting that there are procedural violations specific to an individual child or systemic in nature. Anonymous complaints will not be accepted. All written Complaints received by the Bureau will be forwarded to the Complaint Officer in a timely manner."

Delaware: Not available at the time of compilation of this Appendix.

Florida:

A. Impartial Due Process Hearing Procedure: (6A-15.024(5)(a) Florida Administrative Code)

"§6A-15.024(5)(a) Due Process Hearings.
(a) Due process hearings may be initiated by a parent or a district administrator or designee on the proposal or refusal to initiate or change the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child."

B. EDGAR Complaint Procedure: (Uncodified, contained in the State Plan filed with the United States Department of Education)

No restrictions on who may file a "complaint letter."

Georgia: Not available at the time of compilation of this Appendix.

Hawaii:

A. Impartial Due Process Hearing Procedure:

B. EDGAR Complaint Procedure:

Need Copy Call:

Idaho: Not available at the time of compilation of this Appendix.

Illinois:

A. Impartial Due Process Hearing Procedure: (23 Illinois Administrative Code 226.615)

"**Section 226.615 Request for Hearing**
Pursuant to Section 226.605 of this Subpart, either the district of the parents of any child resident within the district may request a Level I hearing. A parental request for a hearing shall be made, in writing, to the superintendent of the local school district in which the child is a resident."

B. EDGAR Complaint Procedure:

Not available at the time of compilation of this Appendix.

Indiana:

A. Impartial Due Process Hearing Procedure: (511 Indiana Administrative Code 7-5-5)

"**§511 IAC 7-15-5 Due process hearings**
(a) A parent, a public agency, or the state education agency may initiate a due process hearing regarding ... ."

B. EDGAR Complaint Procedure: (511 Indiana Administrative Code 7-5-5)

"**511 IAC 7-5-14 Complaints**
(a) Any individual, group of individuals, agency, or organization may file a complaint alleging violations of federal or state laws that apply to special education programs ... ."

Iowa: Not available at the time of compilation of this Appendix.

Kansas:

A. Impartial Due Process Hearing Procedure: (Kansas Code 72-972)

"**§72-972. Educational placement; right to hearing; notice.**
(a) In accordance with rules and regulations which shall be adopted by every agency, each child, or his or her

lawful custodian, shall be afforded the right to a hearing before the child shall be: ... ."

B. EDGAR Complaint Procedure: (91-12-28 Kansas Administrative Code)

"**§91-12-28. State education agency monitoring of compliance with state and federal requirements.** (1) Any person may file a written, signed complaint alleging that a local education agency is not in compliance with a state or federal law or regulation. The complaint shall state the facts upon which it is based, and shall be filed with the state director of special education. Upon receipt of a complaint, an investigation shall be initiated. At a minimum, each investigation shall include: ... ."

Kentucky:

A. Impartial Due Process Hearing Procedure: (707 Kentucky Administrative Regulations 1:180 §11)

"**Section 11. Due Process Hearings.** A parent or LEA may initiate a hearing on any matter concerning the identification, evaluation, placement or the provision of a free appropriate public education."

B. EDGAR Complaint Procedure: (Uncodified, contained in the State Plan filed with the United States Department of Education)

"The Division of Exceptional Children Services implements complaint procedures which are used to respond to allegations of substance regarding actions

taken by a public agency that are contrary to the requirements of the Individual with Disabilities Education Act (IDEA). These procedures are established to fulfill the requirements of 34 CFR 200.660-300.662.

a. An organization or individual may file a written, signed complaint with the Kentucky Department of Education, Division of Exceptional Children Services."

Louisiana:

A. Impartial Due Process Hearing Procedure: (§507 of Bulletin 1706: Regulations for the Implementation of the Exceptional Children's Act (R.S. 17:1941 et seq.)

"**§507. Impartial Due Process Hearing**

A parent or school system may initiate a hearing on any of the matters described in §504 A. 1 and 2 of these Regulations. A parent initiates a hearing by sending written notice to the parent and

B. EDGAR Complaint Procedure: (Bulletin 1573: Louisiana Department of Education Complaint Management Procedures)

"**Filing of Complaints**

Complaints may be filed by parents, students, child advocates, surrogate parents, other individuals or organizations. Complaints may be filed in writing, by telephone call or in person. A complaint must include a statement that a public agency has violated a requirement of Federal/State law or regulation and the facts upon which the statement is based."

Maine:

A. Impartial Due Process Hearing Procedure: (071 Maine Administrative Regulations Ch. 101-11.1)

"**11 Due Process hearings**

11.1 Right to Hearing

A parent or school unit may initiate a due process hearing on any of the matters specified in Section 10.7."

B. EDGAR Complaint Procedure: (Uncodified, contained in the State Plan filed with the United States Department of Education)

"**Complainant**

The term 'Complainant' means the Interested Party who has submitted the Complaint to the Department.

Interested Party

The term 'Interested Party' means a student's parent, surrogate parent, legal guardian, or other professional with direct knowledge of a failure by the responsible school administrative unit or private school serving exceptional students to comply with Maine or Federal law or regulations concerning the education of exceptional students."

Maryland:

A. Impartial Due Process Hearing Procedure: (Code of Maryland Regulations Title 13A.05.09(A))

"**§.09 Due Process Hearings - Local**

A. A parent or a public agency may initiate a local due process hearing concerning the identification, evaluation,

or educational placement of a student or the provision of a free, appropriate public education to the student. Public agencies shall establish and implement hearing procedures that assure compliance with the requirements of applicable federal law, Education Article, §8-415, Annotated Code of Maryland, and this regulation when a request is made in writing for a due process hearing."

B. EDGAR Complaint Procedure: (Uncodified, contained in the State Plan filed with the United States Department of Education)

"**Complaint Management**
X. Procedure
A. Filing of a Complaint
1. An organization or individual may file a complaint with the MSDE."

Massachusetts: Not available at the time of compilation of this Appendix.

Michigan:

A. Impartial Due Process Hearing Procedure: (Michigan Revised Administrative Rules for Special Education Rule 340.1724(1))

"**§R 340.1724 Impartial due process hearing.**
Rule 24(1). A parent, the district of residence, the district of operation, or the department may initiate a hearing on any of the matters described in R 340-1723a(1)(a) and (b). The party initiating a hearing shall notify the other parties of its intent to initiate a hearing."

B. EDGAR Complaint Procedure: (Michigan Revised Administrative Rules for Special Education Rule 340.1701(g))

"§R 340.1701 Definitions
Rule 1(g). 'Complaint' means a specific written and signed allegation by an agency, a private individual, or an organization that there is an uncorrected violation, misinterpretation, or misapplication of any of the following: ... ."

Minnesota:

A. Impartial Due Process Hearing Procedure: (Minnesota Statutes 120.17, Subd. 3b(e))

"Subd. 3b. Procedures for decisions.
(e) Parents, guardians, and the district shall have an opportunity to obtain an impartial due process hearing initiated and conducted by and in the school district responsible for assuring that a appropriate program is provided in accordance with state board rules, if the parent or guardian continues to object to: ... ."

B. EDGAR Complaint Procedure:

Not available at the time of compilation of this Appendix.

Missouri:

A. Impartial Due Process Hearing Procedure: (5 Code of State Regulations 70-742.140-VI(G))

"**G. Administrative Hearing Rights**
Parents or a public agency may initiate due process concerning the proposed action of the agency to initiate or refuse to initiate or change the identification, evaluation, or educational placement of the child or the provision of a free and appropriate public education to the child. These rights shall be assured through the procedures outlined for administrative reviews, local-level hearing panels, and state-level review."

B. EDGAR Complaint Procedure: (Uncodified, contained in the State Plan filed with the United States Department of Education)

No limitation on who may file a complaint, thus open to any individual or organization.

Montana: Not available at the time of compilation of this Appendix.

Nebraska:

A. Impartial Due Process Hearing Procedure: (92 Nebraska Administrative Code 55-002.1)

"**Chapter 55 - Special Education Appeals**
002 Definitions
002.01 Petitioner shall mean the parent, guardian, competent student of age of majority, or school district filing a petition for a hearing in a special education matter before the Department of Education."

B. EDGAR Complaint Procedure: (92 Nebraska Administrative Code 51-009.07A2)

"**Chapter 51 - 009.07 Complaint Procedures**
Special Education Office officials will investigate each complaint received from an individual or organization to determine whether there has been a failure to comply with these rules and may require further written or oral submission of information by all parties and may conduct an independent on-site investigation if necessary."

Nevada:

A. Impartial Due Process Hearing Procedure: (Uncodified, contained in the State Plan filed with the United States Department of Education)

"**Chapter 2 District Agency Impartial Due Process Hearing Procedures**
Upon receipt of a written request for an impartial due process hearing from a parent in the local school district, the district will forward a copy of the request to the State Superintendent of Public Instruction with a carbon copy to the State Director of Special Education. The district will send written acknowledgment of the receipt of request to the parents informing them of the procedure which will be followed. The State Superintendent of Public Instruction shall officially appoint, in writing, the Impartial Hearing Officer."

B. EDGAR Complaint Procedure: (Uncodified, contained in the State Plan filed with the United States Department of Education)

"**Chapter 6 Complaint Procedures for Public Law 94-142**

No limitation on who may file a complaint, thus open to any individual or organization.

New Hampshire: Not available at the time of compilation of this Appendix.

New Jersey:

A. Impartial Due Process Hearing Procedure: (New Jersey Administrative Code 6:28-2.7(a)-(c))

"**6:28-2.7 Due Process Hearings**

(a) A due process hearing may be requested in regard to the identification, classification, evaluation or educational placement of a pupil age three through 21 and/or the provision of a free, appropriate public education to that pupil. For pupils above the age of 21, any disputes regarding the provision of programs and services to these pupils shall be handled as a contested case before the Commissioner of Education pursuant to N.J.A.C. 6:24.

(b) The parent(s) or adult pupil may request a hearing after receiving written notice of a proposed or denied action or after 30 calendar days have elapsed from the date of a written request by the parent(s) or adult pupil for a change with regard to the pupil.

(c) The district board of education or public agency responsible for the development of the pupil's individualized education program may request a hearing when it is unable to obtain required consent to a proposed action and shall request a due process hearing if it denies the parent(s) or adult pupil's request for an independent evaluation."

B. EDGAR Complaint Procedure: (New Jersey Administrative Code 6:28-9.2)

"**6:28-9.2 Complaint Investigation**
No limitation on who may file a complaint, thus open to any individual or organization.

New Mexico: Not available at the time of compilation of this Appendix.

New York:

A. Impartial Due Process Hearing Procedure: (New York Consolidated Laws Service Educ. §4404(1))

"**§4404 Appeal procedures for children with handicapping conditions**
1. If the recommendation of the committee on special education is not acceptable to the parent or person in parental relationship of a child, or if the committee or board of education or trustees fails to make or effectuate such a recommendation within such periods of time as may be required by regulations of the commissioner, such parents or persons in parental relationship shall notify the board of education of this situation and the board shall appoint an impartial hearing officer to hear the appeal and make a determination within such period of time as the commissioner by regulation shall determine."

B. EDGAR Complaint Procedure:

Not available at the time of compilation of this Appendix.

North Carolina: Not available at the time of compilation of this Appendix.

North Dakota: Not available at the time of compilation of this Appendix.

Ohio:

A. Impartial Due Process Hearing Procedure: (Ohio Administrative Code 3301-51-02(G)(2)(a))

"**(G) Impartial due process hearing**
(2) Initiating a due process hearing
(a) An impartial due process hearing may be initiated by the school district of residence of the child, the parent, or the school district or other educational agency providing the special education and related services."

B. EDGAR Complaint Procedure:

Not available at the time of compilation of this Appendix.

Oklahoma:

A. Impartial Due Process Hearing Procedure: (Policies and Procedures for Special Education in Oklahoma, p. 110)

"**Due Process and Appeals Procedures**
A hearing may be initiated by either a parent of the LEA (e.g., parent refuses consent for initial evaluation) regarding these issues: ... ."

B. EDGAR Complaint Procedure: (Policies and Procedures for Special Education in Oklahoma, p. 107)

"**Complaint Procedures**
Parents and other interested individuals shall be informed by the SDE and LEAs about the complaint procedures, due process hearings, mediation, and other forms of assistance to ensure compliance and to resolve disputes."

Oregon:

A. Impartial Due Process Hearing Procedure: (Oregon Administrative Rules 581-15-081(1)and (2))

"**When Hearing May be Requested**
581-15-081(1) A parent may request a hearing when he or she does not agree with the identification, evaluation, educational placement of a child, or the provision of a free appropriate education to a child who may be disabled.
581-15-081(2) A school district may, but is not obligated to, request a hearing when a parent refuses to give consent for a preplacement evaluation and before a student is initially placed in a special education program."

B. EDGAR Complaint Procedure: (Oregon Administrative Rules 581-01-010(1))

"**Procedures for Complaints as Required by Specific Federal Programs**

581-01-010(1) An organization or individual may file with the State Superintendent of Public Instruction a written, signed complaint that the Department of Education, or a subgrantee, including but not limited to a regional program, an education service district or a local education agency is violating a federal statute or regulation that applies to an educational program."

Pennsylvania:

A. Impartial Due Process Hearing Procedure: (22 Pa. Code §14.64(a) and (b))

"**§14.64 Impartial due process hearing.**
(a) Parents may request an impartial due process hearing concerning the identification, evaluation, educational placement of a child, or the provision of a free appropriate education to, a student who is exceptional or is though to be exceptional ... .
(b) A school district may request a hearing to proceed with an initial evaluation or an initial educational placement when the district has not been able to obtain consent from the parents or in regard to a matter under subsection (a)."

B. EDGAR Complaint Procedure: (Uncodified, contained in the State Plan filed with the United States Department of Education)

"**Procedures for the Complaint Management System**
I. Complaint Policy
Complaints may be filed by public agencies, private individuals or organizations concerning individual students or a group or category of thought-to-be

exceptional students or exceptional students. Allegations of violations from anonymous complainants will not be accepted for review."

Rhode Island: Not available at the time of compilation of this Appendix.

South Carolina:

A. Impartial Due Process Hearing Procedure: (South Carolina Regulations R 43-243V(A))

"**V. Due Process Hearings**
A. A parent or local educational agency or other agency may initiate a hearing to be conducted by the public agency responsible for the child's education regarding the proposed/refused identification, evaluation or educational placement of the child or the provision of a free appropriate education to the child."

B. EDGAR Complaint Procedure: (South Carolina Regulations R 43-243L(A))

"**L. Policies for Investigation of Complaints**
A. Definition of Complaint
The term 'complaint' means a written communication supported by documented evidence and registered by an identifiable individual or organization involving a specific alleged violation of the requirements of P.L. 94-142, the Laws of South Carolina governing the education of the handicapped, and State Board of Education regulations promulgated under the authority thereof. Complaints may be initiated by an organization

or individual, who hereafter shall be referred to as 'constituents.'"

South Dakota:

A. Impartial Due Process Hearing Procedure: (South Dakota Administrative Code 24:05:30:07)

"**24:05:30:07. Impartial due process hearing.** The school district superintendent or a parent upon notice to the school district superintendent may initiate a hearing on the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education."

B. EDGAR Complaint Procedure: (South Dakota Administrative Code 24:05:15:03)

"**24:05:15:03. Complaint Procedure.** An organization or individual may file a written, signed complaint with the secretary."

Tennessee: Not available at the time of compilation of this Appendix.

Texas: Not available at the time of compilation of this Appendix.

Utah:

A. Impartial Due Process Hearing Procedure: (Uncodified, contained in the State Plan filed with the United States Department of Education)

"V. DUE PROCESS HEARING PROCEDURES.

V.A. Request for a Hearing.

1. If the parents or guardians of a student with disabilities are aggrieved by a decision or public agency's proposal to initiate or change, or refuseal to initiate or change, the identification, evaluation, educational placement or the provision of a free appropriate education, tehy are guaranteed an impartial due process hearing of their complaint which is to be made in writing to the local school district superintendent. The public educational agency may also initiate a hearing, as may also, a student with as disability or who is suspected of having a disability who is the age of majority, and who has not been declared incompetent by a Utah Court."

B. EDGAR Complaint Procedure:

Not available at the time of compilation of this Appendix.

Vermont: Not available at the time of compilation of this Appendix.

Virginia:

A. Impartial Due Process Hearing Procedure: (Regulations Governing Special Education Programs for Children with Disabilities §3.4(A)(2))

"§3.4 Procedural Safeguards

A. Due Process

2. Impartial Due Process Hearing

Each LEA or the parent of a child determined or believed to have a disability, shall have the right to initiate a hearing when a disagreement occurs on matters relating to identification, evaluation (including determination of whether or not an IEE at public expense is appropriate), or educational placement of the child or the provision of a free appropriate public education for the child. The LEA may initiate due process to appeal parental withholding of consent where these regulations require the LEA to obtain consent."

B. EDGAR Complaint Procedure: (Regulations Governing Special Education Programs for Children with Disabilities §3.4(C)(1))

"**§3.4 Procedural Safeguards**

C. Complaint Procedure

1. The complaint must be in writing, signed by the organization or individual filing the complaint and contain a statement that an LEA has violated the Individuals with Disabilities Education Act (IDEA) and/or these regulations."

Washington:

A. Impartial Due Process Hearing Procedure: (Washington Administrative Code Chapter 392-171-531(1)(a))

"**WAC 392-171-531 Hearings General: Right to Initiate-Purposes**

(1) Hearings conducted in accordance with WAC 392-171-521 through 392-171-556 may be initiated in the following cases for the purposes stated: (a) The parent(s) of a student (or an adult student) or a school

district may initiate a hearing to challenge or to show (as the case may be) the appropriateness of a proposal by the school district to initiate or change: ... ."

B. EDGAR Complaint Procedure: (Washington Administrative Code Chapter 392-168-135)

"**WAC 392-168-135 Right to register a complaint.** Any individual or entity, or organization may register a complaint. **Provided**, That a complaint filed pursuant to the Hatch Amendment may be filed only by a student or parent or guardian of a student directly affected by the alleged violation: **Provided further**, That if a parent or adult student has also filed a request for a due process special education hearing pursuant to WAC 392-171-531, regarding the same issues, a citizen complaint by such person regarding non-compliance shall be held in abeyance until the hearing has been concluded."

Wisconsin:

A. Impartial Due Process Hearing Procedure: (Wisconsin Administrative Code, Chapter PI 11.10(1))

"**PI 11.10 Hearings.**

(1) Right to a Hearing.

(a) A parent may initiate a hearing under subd. (2) as provided under ss. PI 11.04(8), 11.05(7)(b) and 11.06(6)(c). AS parent may also initiate a hearing under subd. (2) whenever a board proposes or refuses to initiate or change his or her child's free appropriate public education.

(b) A surrogate parent may initiate a hearing under subd. (2) as provided under s. PI 11.14(1)(c)2.

(c) A board may initiate a hearing under subd. (2) as provided under ss. PI 11.04(1)(a)3, 11.06(6)(a)3 and 11.08(3)."

B. EDGAR Complaint Procedure: (Wisconsin Administrative Code, Chapter PI 11.15(2)(a)1)

"**PI 11.15 Monitoring and Complaint Procedures.**
(2) Complaint Procedures.
(a)1. Any person may file a written complaint with the state superintendent alleging that the department or a board has violated a state law under subch. V of ch. 115, Stats., or this chapter."

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No. 94-116

In the
SUPREME COURT OF THE UNITED STATES

October Term, 1994

School City of Mishawaka,
Petitioner,

v.

Family & Children's Center, Inc.,
Respondent.

On Petition for A Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF *AMICI CURIAE* OF INDIANA SCHOOL BOARDS ASSOCIATION AND INDIANA ASSOCIATION OF PUBLIC SCHOOL SUPERINTENDENTS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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II. The result of the Seventh Circuit's misinterpretation of Indiana's procedural safeguards is the commingling of two separate and distinct avenues of due process, which gives a third party greater procedural safeguards than those intended by IDEA. 10

III. The decision of the Seventh Circuit significantly burdens public school corporations, both administratively and financially. 12

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This brief is filed with the consent of both parties. Letters of consent are on file with the Clerk of this Court.

INTEREST OF THE *AMICI*

Amicus Indiana School Boards Association (ISBA) is a nonprofit association organized for the purposes of: (1) instructing school board members as to their roles and responsibilities as members of the boards of school trustees of the public school corporations in the State of Indiana; and (2) instructing the public on education-related subjects in order to improve public school education in the state. ISBA's membership consists of 289 of the 293 boards of school trustees in Indiana.

Amicus Indiana Association of Public School Superintendents (IAPSS) is a nonprofit association with membership that includes 281 of the 293 superintendents of public school corporations in the state. One of the stated purposes of the IAPSS is to serve as an agent for the superintendency to help influence significant decisions pertaining to the education of all school children in the state.

Both associations are very familiar with the federal laws to which public school corporations are subject and inform their members of the mandates of such laws. As representatives of the public school corporations in the State of Indiana, the interest of the associations, as *amici*, in this case is the proper administration of the procedural safeguards set forth in the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400 et seq. All public school corporations in Indiana are subject to the Act and therefore must ensure that proper procedural safeguards are afforded to appropriate persons. The decision of the Seventh Circuit significantly broadens who has the right to access the procedural safeguards set forth at 20 U.S.C. §1415. Because this decision substantially affects public school corporations, both administratively and financially, *amici* respectfully submit this brief.

REASONS FOR GRANTING THE WRIT

IDEA is a federal law that governs the education of all disabled students in this country. Every public school corporation in this nation that receives federal funds is subject to this Act. IDEA mandates that school corporations provide procedural safeguards to parties that disagree as to the free appropriate education offered to students with disabilities. The Act identifies those parties as the parent, guardian, or surrogate parent of the disabled student. 20 U.S.C. §1415. However, the Seventh Circuit in this case concluded that a third party, specifically, a private child care facility, had standing under 20 U.S.C. §1415 to sue a public school corporation for the alleged denial of a free appropriate public education to a group of disabled students served by the facility. The facility is not a parent, guardian, or surrogate parent. This conclusion is contrary to other court opinions and directives from the United States Department of Education on the procedural safeguards required by IDEA.

The court of appeals arrived at this incorrect conclusion by misinterpreting the Indiana administrative regulations which implement IDEA, 511 IAC 7-3 through 7-16. The court wrongly interpreted 511 IAC 7-15-4 as the regulation enacted to implement §1415 of IDEA. Since 511 IAC 7-15-4 allows any individual to file a *complaint*, the court concluded that any individual, not just the parent, guardian, or surrogate parent had standing to initiate a cause of action to challenge an alleged denial of a free appropriate public education to disabled students. This conclusion is in error because 511 IAC 7-15-4 was not enacted pursuant to 20 U.S.C. §1415. It was enacted pursuant to the Education Division General Administrative Regulations (EDGAR), 34 CFR §§76.780-83. The court should have focused on 511 IAC 7-15-5 which was enacted to implement 20 U.S.C. §1415 and limits the right to a due process *hearing* to a parent, guardian, or surrogate parent.

As stated above, the decision of the Seventh Circuit is erroneous and significantly impacts public school corporations in this state. School corporations must be given a correct interpretation of who has the right to initiate a cause of action in accordance with §1415 of the Act.

ARGUMENT

I. The decision of the Seventh Circuit totally violates one of the stated purposes of the Individuals with Disabilities Education Act - to assure that the rights of children with disabilities and their parents or guardians are protected.

IDEA is one of several federal laws enacted to protect disabled individuals from discriminatory treatment. And yet it has a unique purpose. For instance, Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, was designed to eliminate discrimination on the basis of a disability in any program or activity receiving federal funds. Its regulations require public school corporations to provide an educational program designed to meet the needs of the disabled student as adequately as the needs of the nondisabled student. 34 CFR §104.33(b). IDEA was enacted to ensure that all children with disabilities have available to them a free appropriate public education. Its regulations set forth very specific procedures for school corporations to follow to ensure the provision of the mandated free appropriate public education to disabled students. As an example, IDEA mandates how students are to be evaluated for special education services, how educational placement decisions are to be made, how disabled students may be disciplined, and how parents are to be involved in the process of delivering an appropriate education to disabled students.

In addition to meeting the educational needs of students with disabilities, IDEA was designed to protect the rights of the student with disabilities *as well as* the rights of the parent of the disabled child. IDEA's purpose, as stated in the Act, is:

> to assure that all children with disabilities have available to them ... a free appropriate public education ..., to assure that the *rights of children with disabilities and their parents or guardians are protected*, to assist States and localities to provide for the education of all children with disabilities, and to assess and assure the effectiveness of efforts to educate children with disabilities.

20 U.S.C. §1400(c)(emphasis added).

Thus, parents are afforded certain rights under IDEA. For example, before a student may be evaluated for a suspected disability, the parent must consent to the initial evaluation. 34 CFR §300.504(b). Before the school corporation can deliver special education services, the parent of the student must be invited to participate in the development of the special education program. 34 CFR §300.345. The parent has the right to access all records maintained by the school corporation relating to his or her child. 34 CFR §300.502. The parent of the child must consent to the proposed placement before the school corporation can begin providing services. 34 CFR §300.504(b). Should there be a need to change the student's placement, the school corporation must secure the consent of the placement before making the desired changes. 34 CFR §300.504(a). Before the school corporation can expel a disabled student, the school corporation must afford the parent the due process rights set forth in IDEA. 34 CFR §300.504(a).

IDEA's implementing regulations define the parent as:

> a parent, a guardian, a person acting as a parent of a child, or a surrogate parent who has been appointed in accordance with Sec. 300.514. The term does not include the State if the child is a ward of the State.

34 CFR §300.13.

This definition is very specific and very narrow. It includes only those persons who have the lawful authority to make decisions regarding a child's education and does not include any other individual who represents to have the best interests of the disabled child in mind. It does not include any other third party. Thus, it is only the parent, as defined above, and not any other individual, that has rights under IDEA.

The Act is just as specific in its dictates regarding procedural safeguards. The Act requires school corporations to establish procedures to:

> assure that *children with disabilities and their parents or guardians* are guaranteed procedural safeguards with respect to the provision of a free appropriate public education ... .

20 U.S.C. §1415(a)(emphasis added).

The IDEA regulation which implements §1415 allows only a parent or a public educational agency to initiate a hearing regarding the identification, evaluation, or educational placement or the provision of a free appropriate public education to the child with disabilities. 34 CFR §300.506(a). It does not allow a third party to initiate a hearing.

Thus, it is only the student and the student's parent who has the right to initiate a cause of action under §1415. *It is only the children with disabilities and their parents or guardians whose rights are protected under IDEA.* The court of appeals' decision to allow a third party the right to the procedural safeguards mandated in §1415 totally violates the stated purpose of IDEA.

The impact of the court of appeals' decision on the provision of a free appropriate education to a disabled student is significant. For instance, if a third party is deemed to have standing under §1415, this would allow any individual to interfere with the educational placement decisions made by a school corporation and the parent of the disabled student and effectively halt the provision of a free appropriate public education to the disabled student - the very thing the Act was enacted to do.

The impact of this decision can be illustrated in this manner. The concept of "inclusion" is being promoted for special education students. Generally speaking, inclusion can be defined as providing an educational program to the disabled student in the regular education classroom, with support services being brought into that classroom as opposed to the disabled student leaving the classroom for the special services. The concept of inclusion has also been addressed by the courts. Recently two circuit courts of appeal analyzed the mandate of IDEA to provide educational services to the disabled student in the least restrictive environment and concluded that the school corporations failed to meet this obligation because they had not demonstrated that the disabled students in question could not be educated in the regular education classroom. See *Sacramento City Unified Sch. Dist. v. Rachel H.*, 14 F.3d 1398 (9th Cir. 1994) and *Oberti v. Bd. of Educ.*, 995 F.2d 1204 (3rd Cir. 1993). In both of these cases, the students involved were severely disabled, and one student demonstrated serious behavior problems. Despite their specialized needs, both courts held that the school corporations did not meet their burden of proving that the least restrictive

environment for these students was not the regular education classroom with supplementary services being provided in the classroom.

Indiana is also subject to the IDEA mandate of educating disabled students in the least restrictive environment and is funding pilot studies on inclusion in several school corporations. As a result, many more students with disabilities are being educated in the regular classroom. Now, in Indiana, in light of the Seventh Circuit's decision, any individual can access the state's due process provisions and object to the placement of disabled students in the regular education classroom despite the mandate of the federal law and the courts. Should the parent of a severely disabled student and the school corporation agree that the child should be educated in the regular education classroom because that is the least restrictive environment, a parent of a nondisabled student enrolled in the same class as the disabled student can sue the school corporation, asserting that the placement violates IDEA. Once an objection is made and the due process procedures initiated, the disabled student will be forced to remain in a more restrictive placement while the school corporation and the parent defend their placement decision in federal court. The impact of this means that now the disabled student is being denied the free appropriate education guaranteed by IDEA and the rights of the disabled student and the parent of the student are being violated. Clearly, this is contrary to the purpose set forth in IDEA.

In addition to a parent of a nondisabled student having the right to challenge educational placement decisions made for students with disabilities, the holding in the lower court opinion would also give a local teacher's union the same right. This conclusion not only violates the stated purpose of IDEA, but also violates Indiana's collective bargaining law. I.C. 20-7.5-1-1 et. seq.

Indiana's collective bargaining law grants school employers certain management rights. I.C. 20-7.5-1-6(b) clearly sets forth those rights:

> School employers shall have the responsibility and authority to manage and direct in behalf of the public the operations and activities of the school corporation to the full extent authorized by law. Such responsibility and activity shall include but not be limited to the right of the school employer to:
>
> (1) direct the work of its employees;
> (2) establish policy ... ;
> (5) maintain the efficiency of school operations; ... and
> (7) take actions necessary to carry out the mission of the public schools as provided by law.

To allow a local teacher's union to challenge educational placement decisions made by a school corporation and the parent of a disabled student would interfere with these management rights. Again, referring to the inclusion example cited earlier, the school corporation must ensure that the student with disabilities is educated in the least restrictive environment. This may result in the student being educated in a regular education classroom. The regular education classroom teacher may oppose the placement of the disabled child in that class and, with the assistance of the union, may request a due process hearing. Giving a third party, the teacher's union, this right conflicts with the school corporation's right to direct the work of its employees and, more importantly, the right of the school corporation to take those actions which are necessary to comply with federal and state law.

II. The result of the Seventh Circuit's misinterpretation of Indiana's procedural safeguards is the commingling of two separate and distinct avenues of due process, which gives a third party greater procedural safeguards than those intended by IDEA.

As stated earlier, the Seventh Circuit incorrectly concluded that 511 IAC 7-15-4 was promulgated to implement §1415 of IDEA. In actuality, 511 IAC 7-15-4 was promulgated to implement §§76.780-83 of the Education Division General Administrative Regulations (EDGAR). 511 IAC 7-15-5 is the administrative regulation enacted by the Indiana State Board of Education to implement §1415 of IDEA.

The procedural safeguards set forth in IDEA, specifically 20 U.S.C. §1415(b)(1)(E), require the state and local education agency to afford *parents or guardians* an opportunity to present complaints with respect to "the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to the child." 511 IAC 7-15-5 implements this section.

On the other hand, EDGAR requires state agencies to adopt complaint procedures for "resolving any complaint that the State or a subgrantee is violating a Federal statute or regulations that apply to a program." 34 CFR §76.780. 511 IAC 7-15-4 implements this regulation.

These are two separate and distinct procedural safeguards with different purposes required by two different federal laws. The court erred in concluding that 511 IAC 7-15-4 was part of the procedural safeguards required by IDEA. IDEA's procedural safeguards are solely for parents and guardians to access when they disagree with a school corporation's decision with respect to the identification, evaluation, educational placement, or provision of a free appropriate public education to a student with disabilities. EDGAR's procedural safeguards are for any

individual to access when the individual believes there has been a violation of any federal law to which the school corporation is subject.

By confusing these two different avenues of due process, the court of appeals, has commingled the two processes. The court of appeals mistakenly concluded that Indiana has invited third parties to access the procedural safeguards required by 20 U.S.C. §1415. Indiana did not do this. The court of appeals, by virtue of this decision, has granted any individual the right to the due process hearing mandates established by Indiana in accordance with 20 U.S.C. §1415, i.e. 511 IAC 7-15-5. The lower court has now granted third parties greater due process rights than those mandated by IDEA, and due process rights that in fact violate the purpose of IDEA.

This means that any individual can, pursuant to 511 IAC 7-15-5, request the appointment of an independent hearing officer to challenge decisions made regarding the identification, evaluation, educational placement, or free appropriate public education of all disabled students served by the school corporation. Previously, third parties were only afforded the opportunity to file complaints alleging violations of federal or state laws that apply to special education programs. Now, by having access to due process hearings, third parties, in preparation for such hearings, will have access to confidential records relating to students with disabilities maintained by the public school corporation. These are not the due process rights intended by IDEA. IDEA intended for only parents or guardians of disabled students to have the right to a due process hearing to challenge whether or not their students were receiving a free appropriate public education, not any other individuals or third parties. EDGAR intended to allow any individual the right to file complaints alleging a violation of any federal law, including IDEA. As a result of the lower court's decision, a third party can now access both avenues of due process, giving third parties greater procedural rights than established in IDEA.

III. The decision of the Seventh Circuit significantly burdens public school corporations.

In addition to granting due process hearing rights to any individual, the Seventh Circuit appears to be saying that any individual can file a complaint with the state department of education in accordance with 511 IAC 7-15-4, and after exhausting those administrative remedies, can assert jurisdiction under §1415 and file a petition in federal district court. The conclusion of the lower court obviously increases the number of parties who can allege violations of IDEA. This result significantly burdens public school corporations.

More and more school corporations are faced with due process hearings regarding educational services provided to students with disabilities. School officials, including teachers, psychologists, therapists, nurses, and administrators, must spend a significant amount of time preparing for the defense of all decisions made regarding a disabled student's education program. At any time during the process of determining and providing a free appropriate public education, a parent can object and request a due process hearing. For example, a parent could disagree with the results of the evaluation of the existence of a disability, the nature of the regular and/or special education services that will be provided, the placement in which the services will be provided, and whether the student's placement should be changed. To now allow other individuals, not just the parent or guardian of the disabled student, jurisdiction to challenge each one of these decisions will significantly impact school corporations.

While this is a significant administrative burden on school corporations, it also is a substantial financial burden. School corporations must expend limited resources in preparing for hearings and defending their actions during hearings. School corporations must incur these expenses whether or not the allegations have any merit. Additionally, as mandated by IDEA,

school corporations must pay the attorney fees of the challenging party, if that party prevails. 20 U.S.C. §1415(e)(4). This obviously increases the costs associated with due process hearings, and will severely impact school corporations' budgets if persons other than parents or guardians are determined to be prevailing parties.

CONCLUSION

The holding below is a significant departure from other court decisions on this issue and is in error. For the reasons stated above, *amici* urge this Court to grant the petition for a writ of certiorari.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

SCHOOL CITY OF MISHAWAKA,
Petitioner,

v.

FAMILY AND CHILDREN'S CENTER, INC.
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR THE STATE OF INDIANA AS AMICUS CURIAE SUPPORTING CERTIORARI

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QUESTION PRESENTED

Whether a party who lacks standing to bring a claim under the Individuals with Disabilities Education Act, 20 U.S.C. § 1415, may acquire standing to bring such a claim by invoking regulations promulgated pursuant to another more general federal statute.

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BRIEF FOR THE STATE OF INDIANA AS AMICUS CURIAE SUPPORTING CERTIORARI

INTEREST OF THE AMICUS CURIAE

The State of Indiana provides special education and related services to more than 110,000 school-aged children whose disabilities interfere with their educational performance. In order to receive federal funds under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.*, Indiana, as all states, must provide children with disabilities and their parents a meaningful process to ensure that each child receives a free, appropriate public education. *See* 511 Ind.Admin.Code 7-7 *et seq.*

The State is also mandated by federal regulations to provide an administrative procedure to address complaints that federally funded educational programs are failing to comply with federal law, including the IDEA. Indiana, as well as other states, has developed such complaint procedures to comply with the Education Division General Administrative Regulations ("EDGAR"), 34 C.F.R. § 76.780 *et seq.* and 34 C.F.R. § 300.660 *et seq.* [1] Pet. App. 117a.

The State of Indiana has a strong interest in providing parents and disabled children with the process required by the IDEA while preventing third-party interference with their rights. The holding of the Seventh Circuit Court of Appeals in *Family & Children's Center v. School City of Mishawaka*, 13 F.3d 1052 (7th Cir. 1994), severely restricts the State's ability to protect those rights. More broadly, because other circuit courts have recognized that the two types of federally mandated procedures have different scopes and purposes, Indiana has an interest in having this Court resolve the present conflict . Indiana, therefore, submits this brief pursuant to Rule 37.5 of the Rules of this Court to assist the Court in the resolution of this case.

STATEMENT

This case concerns the relationship between the EDGAR complaint procedures and the IDEA procedural safeguards and whether a third party may use the State's EDGAR procedures to take advantage of IDEA procedures specifically reserved for parents.

1. The EDGAR procedures, promulgated pursuant to 20 U.S.C. § 1221e(3)(a)(1), apply to a variety of federally funded educational programs, only one of which is the

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[1] EDGAR complaint procedures also appear in the IDEA regulations at 34 C.F.R. § 300.600 et seq. and were issued under the authority of the U.S. Secretary of Education to ensure compliance with assurances made by agencies. 20 U.S.C. § 2831(a).

IDEA.[2] These procedures are broad in scope and are available to "any individual, group of individuals, agency or organization." 511 Ind.Admin.Code 7-15-4. In contrast, the procedural safeguards promulgated pursuant to the IDEA are narrower in scope and purpose and are limited to parents of a child with a disability to address issues specifically related to the identification, evaluation or placement of the child or matters relating to providing the child with a free appropriate public education.[3] 20 U.S.C. § 1415(b); 34 C.F.R. § 300.500 *et seq.*; 511 Ind.Admin.Code 7-15-5.

2. The Family and Children's Center ("FCC"), a residential treatment center, filed an administrative complaint, invoking the EDGAR procedure. The State agency found no violations, and the U.S. Department of Education declined to hear FCC's appeal. The FCC then filed a lawsuit in the United States District Court for the Northern District of Indiana alleging claims arising under the IDEA and previously rejected by the administrative agencies. The federal court dismissed the claim for lack of standing because FCC was not a parent, guardian or an educational surrogate parent under 20 U.S.C § 1415(b). Pet. App. 17a-35a.

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[2] The statutory authority for what is popularly known as EDGAR complaints is derived from the General Education Provisions Act ("GEPA"), P.L. 90-247, 81 Stat. 783, Title 1 Sec. 305, Jan. 2, 1968. When initially proposed, the rules were "general regulations to apply to all direct grant and State administered programs administered by the Education Division" of the Department of Health, Education and Welfare. 44 Fed.Reg 26,298 (1979). The Notice of Proposed Rulemaking also indicated that all regulations pertaining to such activities would be consolidated into one set of rules to be known as EDGAR. Id.

[3] The implementing regulations for the IDEA indicate in unequivocal language that an impartial due process hearing is available only for "[a] parent or a public educational agency." 34 C.F.R. § 300.506(a). "Parent" is defined to include "a parent, a guardian, a person acting as a parent of a child, or a surrogate parent who has been appointed in accordance with Sec. 300.514." 34 C.F.R. § 300.13. "Public agency" includes the State Education Agency (SEA), a Local Educational Agency (LEA), an Intermediate Educational Unit (IEU) and "any other political subdivisions of the State that are responsible for providing education to children with disabilities." 34 C.F.R. § 300.14

On appeal, the Seventh Circuit Court of Appeals reversed, finding that Indiana's EDGAR procedure provided the FCC a vehicle to gain standing to bring an action under the IDEA. The Seventh Circuit reasoned that, because the State provided an administrative complaint process required by one federal regulatory scheme, such process was an extension or enhancement of the procedural safeguards required by the IDEA and its implementing regulations, thereby affording any individual access to the procedural safeguards of 20 U.S.C. § 1415. Pet. App. 1a-16a.

REASONS FOR GRANTING THE WRIT

A. The Seventh Circuit's Decision Conflicts with Those of Other Circuits on an Issue of Considerable Importance.

The Seventh Circuit's analysis of the relationship between the EDGAR procedures and those required by the IDEA significantly departs from that of other circuits. This departure from the proper analytical framework results in an erroneous conclusion that, if not corrected, creates a problem not only for states within the circuit, but also for those in circuits in which the issue has not been addressed. Because the relationship between these two protocols has been and will continue to be a recurrent issue, this Court should resolve the conflict established by the Seventh Circuit's holding below. Without such resolution, there is a serious risk of establishing wrongful precedent, based on the Seventh Circuit's analysis and decision, in those circuits whose analysis would not otherwise lead to this erroneous conclusion.

Until the Seventh Circuit's recent decision, other circuit courts of appeal had recognized that the EDGAR complaint procedures were distinct and separate from the IDEA procedural safeguards. Most recently in 1993, the Tenth Circuit Court of Appeals stated "[t]he EDGAR procedures are

different in both purpose and scope from those in the IDEA and do not provide parents who file complaints with the same opportunities for a full administrative hearing and judicial review." *Association for Community Living v Romer*, 992 F.2d 1040, 1045 (10th Cir. 1993)(citation omitted). Other circuits have similarly distinguished the two procedures. *See Hoeft v. Tucson Unified School Dist.*, 967 F.2d 1298 (9th Cir. 1992) (the EDGAR procedures are an administrative mechanism in addition to the procedural safeguards of the IDEA); *Christopher W. v. Portsmouth School Committee*, 877 F.2d 1089 (1st Cir. 1989) (exhaustion of EDGAR administrative remedies is distinct from exhausting remedies under the EHA [predecessor to the IDEA]); and *Mrs. W. v. Tirozzi*, 832 F.2d 748 (2nd Cir. 1987) (EDGAR procedures have different purpose than IDEA procedural safeguards).

The First, Second, Ninth and Tenth circuits employed the correct analysis in recognizing that proceedings under EDGAR and the IDEA are different in scope and purpose. The Seventh Circuit's failure to utilize a similar analysis results in an untenable conclusion in conflict with the other circuits. It is incumbent upon this Court to resolve this disparity.

B. The Seventh Circuit Failed to Afford Due Deference to the Agency's Interpretation of Its Own Regulations.

Not only did the Seventh Circuit ignore the analysis and findings of its sister circuits, it also disregarded the principled of deferring to an agency's interpretation of its own regulations. As this Court stated in *Chevron, U.S.A. v. Natural Resources Defense*, 467 U.S. 837 (1984):

> We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to

> administer, and the principle of deference to administrative interpretations "has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies . . ."

Id. at 844 (citations omitted). This Court has also held that if "an agency's interpretation of its own regulation does not violate the Constitution or a federal statute, it must be given 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" *Stinson v. U.S.*, 113 S. Ct. 1913, 1919 (1993).

The two primary federal policy making agencies for the IDEA are the Office of Special Education and Rehabilitative Services (OSERS) and the Office of Special Education Programs (OSEP). In *Metropolitan School District of Wayne Township v. Davila*, 969 F.2d 485 (7th Cir. 1992), cert. den., 113 S. Ct. 1360 (1992), the Seventh Circuit Court of Appeals acknowledged that deference would be given to the OSERS' interpretations of its own administrative regulation. The United States Department of Education has long distinguished EDGAR complaint procedures from IDEA due process procedures. *See Johnson,* 18 IDELR 589 (OSERS, 1991)[4] ("The due process and complaint procedures are two separate, distinct or independent remedies.") Pet. App. 81a.

Although courts do not defer to agency interpretations of a statute or regulation when the agency's interpretation is arbitrary and capricious, deference is required in this case. The Department's interpretation of the distinction between EDGAR procedures and the IDEA procedural safeguards cannot be deemed arbitrary and capricious both

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[4] The primary reporting service for disability related case law, policy interpretations and other adminstrative actions is the Individuals with Disabilities Education Law Reporter ("IDELR"), formerly entitled the Education of the Handicapped Law Reporter ("EHLR").

because it comports with the interpretations rendered by other circuit courts of appeal and because it is consistent with the principles of statutory construction. *Estate of Cowart v. Nicklos Drilling Co.*, 112 S. Ct. 2589, (1992)("[It] is the basic and unexceptional rule that courts must give effect to the clear meaning of the statute as written.."); *Morales v. Trans World Airlines*, 112 S. Ct. 2031, 2037 (1992)("[I]t is a commonplace of statutory construction that the specific governs the general.").

In this case, a general supervisory statute[5] authorizes the promulgation of EDGAR , and the IDEA is the authority for the procedural safeguard regulations. The IDEA is the more specific of the two statutes, stating in part:

> Any State educational agency . . .which receives assistance under this subchapter shall establish and maintain procedures . . . to assure that children with disabilities and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies and units.

20 U.S.C. § 1415(a). OSERS and the State of Indiana have consistently maintained that the IDEA procedural safeguards are limited to disabled children and their parents and that the EDGAR and IDEA procedures are separate and distinct.

Despite the Seventh Circuit's previous deference to agency interpretations, it abandoned that deference in the *FCC* case and supplied its own erroneous interpretation. Had such deference been afforded, the Seventh Circuit would have reached an appropriate conclusion in concert with the other circuits.

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[5] The General Education Provisions Act, 20 U.S.C. § 1221e-3(a)(1) authorizes, among other things, the promulgation, issuance, rescision and amendment of "rules and regulations governing the manner of operation of , and governing the applicable programs administered by the agency."

C. The Seventh Circuit's Decision Prevents the State's Compliance with the Requirements of the IDEA.

The ramifications of the Seventh Circuit's holding are significant. Compliance with the Seventh Circuit's decision it makes it impossible for Indiana to comply with the mandates of the IDEA because it cannot prevent third parties from interfering with the rights granted to disabled children and their parents.

To qualify for federal funding under the IDEA, each state must have an approved State Plan which complies with all of the federal requirements. 20 U.S.C. § 1413. To be approved, the State Plan must contain policies and procedures for establishing the procedural safeguards mandated by 20 U.S.C. § 1412. [6] All states, including Indiana, have procedures in place for investigating EDGAR complaints and conducting IDEA due process hearings.

Federal statutory and regulatory authority limits the availability of the IDEA procedural safeguards to parents, guardians or educational surrogate parents. The EDGAR procedure for challenging a state's compliance with the IDEA is available to a much broader population, including parents, guardians or educational surrogate parents, as well as any individual or organization.

The Seventh Circuit's analysis permits third parties to interfere with the educational rights of children with disabilities. Because all states have implemented EDGAR complaint procedures and IDEA procedures, the Seventh Circuit's reasoning would permit third parties, under the guise of advocating for children's rights and interests, to

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[6] " A primary mechanism for addressing compliance issues is OSEP's review of each State's three-year [IDEA-B] plan . . . OSEP's review of these plans provides a good examination of virtually all pertinent State policies and procedures. " *Trible*, EHLR 211:396, 397 (OSERS, 1986). Indiana's State Plan was approved by OSERS.

interfere with their rights using procedures unequivocally reserved by Congress for children with disabilities and their parents, guardians or educational surrogate parents. If third parties are allowed to interfere in such a manner, a state cannot comply with the assurances of its State Plan that it will safeguard the rights of children with disabilities and their parents.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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No. 94-116

In The

Supreme Court of the United States

October Term, 1994

SCHOOL CITY OF MISHAWAKA,

Petitioner,

v.

FAMILY & CHILDREN'S CENTER, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Indiana special education complaint procedure set forth at 511 IAC 7-15-4 and its predecessor 511 IAC 7-1-7 were promulgated pursuant to the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 et seq., or pursuant to the Education Department General Administrative Regulations ("EDGAR"), 34 CFR 76.780-83.

RULE 29.1 STATEMENT

Respondent, Family and Children's Center, Inc., is a nonprofit corporation organized under the laws of the State of Indiana with its principal place of business in Mishawaka, Indiana. It has no parent company or non-wholly-owned subsidiaries.

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SCHOOL CITY OF MISHAWAKA,

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 13 F.3d 1052. The opinion of the district court (*Id.* at 17a-35a) is not reported.

JURISDICTION

The court of appeals entered judgment on January 5, 1994 (Pet. App. 1a) and denied the Petition for Rehearing with Suggestion for Rehearing In Banc by Amended Order of March 17, 1994 (*Id.* at 60a).

STATUTES AND REGULATIONS INVOLVED

Three sets of legislative authority are at issue in this case: Indiana regulations, federal regulations, and federal statutes.

The Indiana regulations at issue comprise Rule 15 of Article 7 of Title 511 of the Indiana Administrative Code (511 IAC 7-15), which is entitled "Due Process Procedures." Within Rule 15, two regulations are particularly relevant: 511 IAC 7-15-4 and 7-15-5 (Pet. App. 73-80a). Also involved is a predecessor regulation, 511 IAC 7-1-7 (Res. App. 1-2).

The principal federal statute involved is the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 et seq., particularly 20 U.S.C. § 1415 (Pet. App. 61-66a).

The principal federal regulations at issue are the Education Department General Administrative Regulations ("EDGAR"), 34 CFR 76.780-83 (Pet. App. 70-72a), and 34 CFR 300.660-62 (Pet. App. 68-69).

STATEMENT OF THE CASE

This case concerns the obligation of the defendant, School City of Mishawaka ("School City"), to educate certain disabled children (the "Children") placed under the care, custody and control of the plaintiff, Family & Children's Center, Inc. ("FCC").

The facts underlying the dispute between the parties are aptly summarized by the Seventh Circuit in section I

of its opinion (Pet. App. 1-4). Respondent adopts the Seventh Circuit's statement of those facts as its own.[1]

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[1] Petitioner's recitation of facts is incorrect in several respects. These are not relevant to the Court's decision whether to grant a Writ of Certiorari and thus will not be emphasized here by Respondent. Nevertheless, to avoid any claim of waiver, Respondent here sets forth in summary fashion misstatements of fact in the petition. Contrary to Petitioner's assertions:

1) FCC has legal custody of the Children. The Children have been placed with FCC as a result of court order or as a result of action by state or local child welfare departments.

2) It is not true that "many of the children are sexual offenders." Nor is it true that any of the children are "incarcerated."

3) Apart from its campus and offices in Mishawaka, FCC owns and operates three group homes: one in Mishawaka and two in South Bend. The group home environment is part of the overall treatment for many of FCC's Handicapped Children. There are frequent transfers of Handicapped Children between the group homes and the campus of FCC.

4) In 1979 FCC took action in response to the large number of Children School City suspended and expelled from its schools because of behaviors related to their disabilities. When School City expressed its unwillingness to deal with the Children in any other way, FCC began its own school and started educating the Children at its expense.

5) In 1982, FCC approached School City about the latter fulfilling its obligation to educate the Children. School City would only agree to provide FCC with a portion of transfer tuition monies received from the Children's home counties.

6) In 1982, School City entered into an agreement with FCC under which School City agreed to reimburse FCC 95% of the transfer tuition received as to FCC's Children and FCC agreed to provide the educational program for the Children.

7) Over the next eight years, there was an increase in the degree of emotional impairment and in the number of Children placed with FCC. Consequently, increased demands were placed upon FCC to meet the educational needs of the Children.

The issue before this Court turns not upon those facts, but upon the procedural history of the case and the

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These circumstances, combined with the fact that School City was statutorily responsible for educating the Children, led FCC to request that School City again educate the children.

8) In February, 1990, School City announced at a meeting with FCC representatives that it was not responsible for and would not educate the Children at all. After much negotiation, School City finally acknowledged in July 1990 that it was legally responsible to educate the Children.

9) In August, 1990, FCC and School City entered into an agreement under which School City would assume full responsibility for the year-round education of FCC's Children beginning with the 1991 summer school session, and FCC agreed to construct or renovate a facility at its main campus for use by School City in educating the Children, which facility would be leased from FCC by School City.

10) In 1991, School City employed a new superintendent, who announced that School City would not honor its agreement with FCC. School City refused to pay rent to FCC for the use of its facilities to educate the Children; and refused to educate those Children who on a periodic and temporary basis are treated at FCC's two group homes in South Bend. School City then threatened that it would not proceed with educating any of the Children housed at FCC's main campus unless certain conditions were met. FCC objected to School City's use of the Children as "pawns" during the last-minute, forced negotiations. It was not until late August, 1991, that School City finally stated that it would provide educational services to the Children.

11) Since the 1991-92 school year, School City has only agreed to provide teachers and administrators, and only for those of the children who sleep at FCC's main campus. School City has refused to provide classrooms or facilities to educate FCC's Children and has refused to educate the children who are treated periodically at FCC's two South Bend group homes in South Bend. The refusal of School City to educate the Children periodically and temporarily treated at FCC's two South Bend group homes has resulted in great harm to the children.

history of the Indiana regulations under which the case proceeded.

A. Administrative Proceedings

On September 17, 1991, FCC filed a petition with the Indiana State Board of Education, requesting an order directing School City to (1) provide facilities, teachers, and staff for the education of the Children, (2) educate those of the children who are housed from time to time at FCC's group homes, (3) pay FCC for the fair and reasonable value of the use of FCC's facilities in educating the Children, (4) reimburse FCC for its expenses in educating the Children, and (5) provide year-round education for those children so in need.

The Indiana Department of Education ("IDOE") decided to address FCC's petition in a two-part manner. First, the IDOE referred the matter to its Division of Special Education (the "Division") for an investigation into whether School City had violated Indiana education regulations. On December 9, 1991, the Division entered findings of fact, conclusions of law, and orders (Pet. App. 36-50a). On December 22, 1991, FCC filed a Request for Reconsideration and, on January 14, 1992, the Division denied FCC's Request (*Id.* at 51-54a). FCC appealed the Division's findings to the United States Department of Education. On July 22, 1992, the United States Department of Education declined to hear FCC's appeal (*Id.* at 55a-56a).

Second, the IDOE, by its own action and over the objection of FCC, determined that the "Facilities Issue" – whether School City is obligated to provide classrooms

and related facilities in educating the Children - should be resolved as a transfer tuition matter and not as a special education matter. Because the Facilities Issue was viewed by the IDOE as a matter involving Indiana's transfer tuition statute, the hearing officer dismissed that portion of FCC's petition, concluding that transfer tuition could only be received by a school corporation and FCC was not a school corporation (*Id.* at 57-59a). The hearing officer concluded that "FCC and School City have exhausted their administrative remedies with respect to all claims, defenses, and issues in this matter which were not considered a part of the Rule S-1 review procedure and which are not a part of the Appeal to the United States Department of Education." (Pet. App. 59a).[2]

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[2] FCC thus exhausted all avenues of administrative appeal pursuant to 511 IAC 7-15-4. According to 511 IAC 7-15-4(j), FCC's next step was an "appeal to a civil court with jurisdiction." (Res. App. 7). School City now asserts that exhaustion of administrative remedies is an issue for this Court.

First, School City did not raise the issue of exhaustion before the district court or the court of appeals, until its petition for rehearing. The issue was therefore waived. *See, e.g., Schoolcraft v. Sullivan*, 971 F.2d 81, 85 (8th Cir. 1992) ("The second element of jurisdiction, the exhaustion of administrative remedies, although jurisdictional, is nonetheless deemed waivable."), *cert. denied*, 114 S.Ct. 902 (1994).

Second, the question of exhaustion is entirely subordinate to the central question posed by the petition – whether 511 IAC 7-15-4 is an IDEA procedure or an EDGAR procedure. If 511 IAC 7-15-4 is an IDEA procedure, then FCC has exhausted its administrative remedies. If 511 IAC 7-15-4 is an EDGAR procedure, then an exhaustion issue would arise.

Third, even if the issue does arise, the type of exhaustion suggested by School City would be futile. School City asserts that FCC, having exhausted the procedures set forth in 511 IAC

B. Judicial Proceedings

On May 29, 1992, FCC filed suit against School City in the United States District Court for the Northern District of Indiana, South Bend Division. In its original complaint, FCC asserted four claims under the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-85 (the "IDEA"), and three claims under Indiana law.

On December 4, 1992, School City filed with the district court a motion to dismiss, contending that FCC does not have standing to assert claims under the IDEA. School City also asked the district court to dismiss without prejudice FCC's state law claims by declining to exercise supplemental or pendent jurisdiction over them.

In response, on February 16, 1993, FCC moved for leave to amend its complaint and to dismiss without prejudice its state law claims. On February 24, 1993, the district court granted FCC's motion. FCC's state law claims were dismissed without prejudice, and FCC's Amended Complaint was filed.

7-15-4, must also exhaust the procedures available under 511 IAC 7-15-5. But School City has also argued that 511 IAC 7-15-5's procedures are not available to FCC because it is not a parent, guardian, or surrogate parent. Any attempt by FCC to resort to such remedies would obviously be futile. *See Honig v. Doe*, 484 U.S. 305, 326-27 (1988) ("It is true that judicial review is normally not available under § 1415(e)(2) until all administrative proceedings are completed, but as we have previously noted, parents may bypass the administrative process where exhaustion would be futile or inadequate.").

On March 19, 1993, following oral argument, the district court issued a Memorandum and Order granting School City's motion to dismiss and ordering the entry of judgment accordingly (Pet. App. at 17-35a). FCC appealed to the United States Court of Appeals for the Seventh Circuit, which reversed the district court on January 5, 1994 (*Id.* 1a-16a).

The Seventh Circuit based its judgment, in relevant part, upon the following reasoning:

1. "Section 1415(b) of the IDEA requires states to provide an impartial administrative process that assures compliance with the federal mandate of a 'free appropriate education' by the relevant state agencies." Pet. App. 5a.

2. Indiana's IDEA-required administrative process is codified in part at 511 IAC 7-1-7 and, after amendment and recodification in January, 1992, at 511 IAC 7-15-4. *Id.*

3. "According to the IDEA, the required process 'shall include, but shall not be limited to' an opportunity for parents, guardians, or surrogates to examine records and file complaints with state or local educational authorities. 20 U.S.C. 1415(b)." *Id.*

4. "Congress created a procedural minimum below which a state cannot fall if it wishes to retain eligibility for federal assistance. In so doing, Congress gave no indication of forbidding a state from providing greater protection for the rights of the children." *Id.* at 13a.

5. "Indiana's regulatory scheme extends beyond the minimum required by § 1415 in that it permits '[a]ny individual, group of individuals, agency, or organization' to file a complaint alleging violation of federal or state laws that apply to special education. 511 IAC 7-15-4." *Id.* at 5a.

6. "In other words, the Indiana legislature has invited FCC to initiate the state administrative process required by § 1415(b). . . . " *Id.* at 14a.

7. FCC initiated and exhausted the Indiana procedure dictated by 511 IAC 7-1-7 and 511 IAC 7-15-4. *Id.* at 5-6a, 14a.

8. "Thus, FCC was entitled to proceed under paragraph (2) of § 1415(e). *Id.* at 14a.

On February 4, 1994, School City filed with the Seventh Circuit a Petition for Rehearing with Suggestion for Rehearing In Banc, in which School City took issue with step 2 of the court of appeals' reasoning – that 511 IAC 7-1-7 and its successor 7-15-4 were adopted by Indiana pursuant to the IDEA. School City argued that 511 IAC 7-15-4 is actually an EDGAR procedure, exhaustion of which does not entitle FCC to proceed in federal court under 20 U.S.C. § 1415(e). The court of appeals requested a response from FCC. In its response, FCC reviewed for the court the legislative history of 511 IAC 7-1-7 and 511 IAC 7-15-4, which reveal that these regulations were expressly adopted "to implement the provisions of the Individuals with Disabilities Education Act." 15 Indiana Register 505, 550 (Res. App. 3). The court of appeals

denied the Petition by Amended Order of March 17, 1994 (*Id.* at 60a).

ARGUMENT

This case turns on features of Indiana regulatory law which are unique and, if problematic for the State or its Department of Education, can be modified by amending regulations. The decision of the Seventh Circuit is a correct interpretation of present Indiana law and does not conflict with the holding of any other court. Thus, no further review of this case is warranted.

A. Indiana's 511 IAC 7-1-7 and 7-15-4 are Regulations Promulgated Pursuant to the IDEA, not EDGAR.

The Seventh Circuit was correct in its conclusion that the complaint procedure set forth in 511 IAC 7-1-7 and 511 IAC 7-15-4 was promulgated pursuant to the IDEA.

1. 511 IAC 7-1-7 was adopted before EDGAR was ever proposed.

Indiana's original special education complaint procedure, 511 IAC 7-1-7, was adopted by Indiana on September 24, 1978.[3] At that time, *there were no EDGAR*

[3] *See* 511 IAC 7-1-7 (1992 edition) ("filed Aug. 25, 1978") (Res. App. 2). In Indiana, regulations take effect 30 days after filing. *See* Indiana Code § 4-22-2-21; *see also* Indiana Register

regulations. The EDGAR regulations were not even proposed until May 1979 and were not adopted until May 1980. 44 Fed. Reg. 26308 (1979); 45 Federal Register 22494 (1980).[4] Certainly, 511 IAC 7-1-7, the predecessor to the subject regulation, 511 IAC 7-15-4, was not enacted pursuant to EDGAR.

2. 511 IAC 7-15-4 is the complaint mechanism called for under the IDEA.

Indiana's 511 IAC 7-1-7 was repealed effective January 8, 1992.[5] 15 Indiana Register 505, 558 (Res. App. 3, 7). At the same time, a new set of special education regulations – *including* 511 IAC 7-15-4 – was added with the express purpose *"to implement the provisions of the Individuals with Disabilities Education Act."* 15 Indiana Register 505 (Res. App. 3) (emphasis added). These regulations, as expressly stated by the Indiana Department of Education, were *not* implemented pursuant to EDGAR. *Id.*[6]

Vol.15 No. 4 (Jan. 1, 1992) at 505 (Res. App. 3) ("Effective 30 days after filing with the secretary of state.").

[4] *See also* 45 Fed. Reg. 77368 (1980), reporting the redesignation of 45 CFR 100b regulations to 34 CFR 76 regulations.

[5] At that time, on January 8, 1992, FCC's Request for Reconsideration was pending before the Division of Special Education.

[6] As Petitioner correctly notes (Petition p. 2) and is evident from the authority referenced by the regulations (Pet. App. 70-72a), the EDGAR regulations were not promulgated pursuant to the IDEA, but pursuant to various other provisions of Title 20.

Note also that 511 IAC 7-15-4 could not have been adopted pursuant to 34 CFR 300.660-62, because these federal regulations were not in existence at the time 511 IAC 7-15-4 was

As a group, these regulations comprise "Article 7" of Title 511 of the Indiana Administrative Code. Article 7 contains sixteen "Rules." Rule 15 (511 IAC 7-15), *which is entitled "Due Process Procedures"*, contains six "sections": 7-15-1 through 7-15-6. 15 Indiana Register 550-557 (Res. App. 3-7). One of these "due process procedures" is the complaint procedure, section 7-15-4, sandwiched between the mediation procedure and the hearing procedure. (*Id.*) Thus, when Indiana revised its special education regulations in 1992, it created a complaint procedure, 511 IAC 7-15-4, that is an IDEA "due process procedure."

The content, as well as the dress, of 511 IAC 7-15-4 compels this conclusion. Section 1415(b)(1)(E) of the IDEA calls for states to establish "an opportunity to present complaints." 511 IAC 7-15-4 provides an opportunity to present "complaints" – 511 IAC 7-15-5, by comparison, does not. Section 1415(b)(1)(E) of the IDEA calls for a mechanism to receive complaints about *special education*. 511 IAC 7-15-4 is limited to complaints about special education. Section 1415(b)(1)(E) of the IDEA does not limit its demand to a complaint procedure for parents and guardians only. Nor does 511 IAC 7-15-4.

In contrast, EDGAR calls for states to have in place a mechanism for receiving complaints about *all federally-funded education programs.*[7] 34 CFR 76.780 (Pet. App 70a).

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adopted. 511 IAC 7-15-4 may now do double duty and fulfill Indiana's obligations under 34 CFR 300.660-62, as the State claims, but it certainly was not adopted for that purpose.

[7] EDGAR applies to over 20 federally-funded education programs, of which the IDEA is but one. *See* 45 Federal Register 22518-22519.

Far from the universal complaint mechanism envisioned by EDGAR, 511 IAC 7-15-4 is specific to special education, and it requires that complaints be submitted to one specific State department – the Division of Special Education. Title 511 IAC itself is entitled "Special Education," and the text of 511 IAC 7-15-4 makes no fewer than ten references to "special education" or the "division of special education".[8]

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[8] 511 IAC 7-15-4 (Res. App. 3-7) provides:

> Sec. 4(a) Any individual, group of individuals, agency or organization may file a complaint alleging violations of federal or state laws that apply to *special education* programs. The complaint shall:
>
> * * *
>
> (4) be submitted to the *division of special education.*
>
> (b) The *division of special education* shall develop and implement written procedures to investigate complaints. These procedures shall be available upon request and shall include the following:
>
> (1) A system to follow when complaints are received by the *division of special education* office including the following:
>
> * * *
>
> (d) The investigation of a complaint may involve off-site and on-site investigation procedures. The complaint investigator shall have the following responsibilities:
>
> * * *
>
> (4) Filing a written response with the following:

Indiana's 511 IAC 7-15-4 may be contrasted with Arizona Administrative Code § R7-2-804 (Res. App. 8-10),

---

(A) The complainant.

(B) The superintendent or chief executive officer of the public agency involved.

(C) The *special education* program administrator of *the special education planning district* involved.

(D) *The director of the division of special education.*

* * *

(e) The final written response of the complaint investigator shall be filed within thirty (30) calendar days of the date the written complaint is received. An extension of time may be granted by the *director of the division of special education* only if exceptional circumstances exist with respect to a specific complaint. In that event, all parties shall be notified in writing of the extension and the reasons for it.

* * *

(h) Either the public agency or the complainant may request reconsideration by the *director of the division of special education* of any part of a complaint report. A request for reconsideration must be filed within fifteen (15) calendar days of the date the complaint report is received by the public agency and the complainant. The request for reconsideration shall:

* * *

(i) Reconsideration of a complaint report shall be conducted by the director of the division of special education. Written notice of the result of that reconsideration shall be issued within fifteen (15) calendar days of the date the request for reconsideration is received by the *director of the division of special education.*

the EDGAR procedure at issue in *Hoeft v. Tucson Unified School Dist.*, 967 F.2d 1298, 1300 (9th Cir. 1992). The Arizona EDGAR regulation is not limited to special education complaints, but includes "complaints alleging the failure of a public agency or school district to comply with federal statutes or regulations applicable to federal education programs conducted under and subject to Title 34, Code of Federal Regulations, § 76.780." Ariz. Admin. Code § R7-2-804 (Res. App. 8).

Finally, while section 1415(e) of the IDEA contemplates a right of judicial review from the complaint procedure required by section 1415(b)(1)(E), EDGAR does not contemplate any judicial review.[9] Notably, 511 IAC 7-15-4(j) specifically states that a party disagreeing with the administrative result "may appeal to a civil court with jurisdiction." (Res. App. 7). Thus, judicial review is available under both 511 IAC 7-15-4 and 1415(e)(2) of the IDEA. Judicial review is available under section 1415(e)(2) where "findings and a decision [are] made under subsection (b)."[10] FCC received detailed written findings and a decision under 511 IAC 7-15-4, a "due process procedure" adopted "to implement the provisions of the Individuals with Disabilities Education Act." 15 Indiana Register 505, 550 (Res. App. 3).

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[9] The fact that EDGAR does not require judicial review is a point made repeatedly by the Petitioner. (Petition n.9, n.10). This, of course, only supports the Seventh Circuit's conclusion that 511 IAC 7-15-4, which refers expressly to judicial review, is not an EDGAR regulation.

[10] Note that the IDEA does *not* require that a hearing take place prior to judicial review. 20 U.S.C. § 1415(e)(2) (Pet. App. 63a).

Indiana regulation 511 IAC 7-15-4 sets forth the complaint procedure described in the IDEA, not the complaint procedure described in EDGAR. The only reasonable conclusion is that drawn by both the District Court and the Seventh Circuit: 511 IAC 7-15-4 is indeed a due process procedure called for by section 1415(b) of the IDEA.

B. The Seventh Circuit's Decision Turned on Indiana Law and Does Not Conflict With Any Other Holding of Any Court.

The "decision to extend third-party standing to initiate due process hearing procedures under the IDEA by individuals and organizations other than parents, guardians, surrogate parents, or a public agency" (Petition p. 8) was made by the Indiana Department of Education when it promulgated 511 IAC 7-1-7 and 7-15-4. The Seventh Circuit did not make that decision, but merely acknowledged and applied it to the circumstances presented by this case.

The Indiana Department of Education, in effect, opened the door to FCC. If it wants to close that door, it can do so by amending its regulations. Indeed, counsel for the Department acknowledged to counsel for FCC that the Department intends to do so.[11] Such state

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[11] This Court should note that the State of Indiana, which might otherwise be perceived as a neutral amicus curiae, in fact has an interest in supporting School City's petition. If FCC has standing, and the district court determines that School City has certain obligations to the FCC under the IDEA, then the State may share responsibility for fulfilling those obligations. For

regulatory action is the appropriate measure for shutting the door – not Supreme Court review.

No other court, let alone any other federal court of appeals, has addressed the rights of a party, in a position similar to that of FCC, to prosecute a complaint through the procedure set forth in Indiana's 511 IAC 7-15-4 and appeal from that procedure to federal district court.[12] The Seventh Circuit's decision, therefore, is not in conflict with any other decision.

Petitioner attempts to create a national issue with the allegation that "Every state has regulations substantially identical to those of Indiana." But, judging from the compilation of regulations gathered by the Petitioner,[13] it appears that not one of the other states' EDGAR regulations is identical to 511 IAC 7-15-4 in any relevant

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similar reasons (but under Indiana state law rather than the IDEA), School City filed a third-party complaint against the State in the state-court litigation referred to by School City in footnote 5 of its petition. The very counsel who authored the amicus brief for the State are counsel of record in the state-court litigation.

[12] The cases cited to by petitioner as being "in conflict" with the Seventh Circuit's decision in this case (Petition pp. 12-13) all involve state regulations which are clearly EDGAR regulations. Citation to such authority begs the question which the Seventh Circuit faced and properly answered in this case.

[13] Curiously, Petitioner did not include the Arizona EDGAR provision discussed above, although FCC had included the complete text of that provision in its Answer to Petition for Rehearing, filed with the Seventh Circuit on February 22, 1994. As discussed above, certainly Arizona's EDGAR regulation is not "substantially identical" to Indiana's 511 IAC 7-15-4.

respect. Not one was promulgated with the express purpose "to implement the provisions of the Individuals with Disabilities Education Act." 15 Indiana Register 505, 550 (Res. App. 3). Not one is contained in a Rule which is entitled "Due Process Procedures." Not one is sandwiched between an IDEA due process mediation procedure and an IDEA hearing procedure. (Res. App. 3-7). Not one expressly contains a right to "appeal to a civil court with jurisdiction." In contrast, several of the other states' regulations (e.g. Arizona, Arkansas, Kentucky) clearly delineate their EDGAR procedures with references to EDGAR or to 34 CFR 300.

C. The Seventh Circuit's Decision Does Not Conflict With Congressional Intent.

As School City notes (Petition pp. 17-19), Congress itself considered including in the IDEA a requirement that every state's IDEA procedures allow complaints from individuals other than parents, guardians, or surrogate parents. Congress rejected that provision. Nevertheless, as the Seventh Circuit noted, Congress did not prohibit the states from enacting IDEA regulations to allow other third parties to enter the "IDEA due process" system.

> In § 1415, Congress created a flexible scheme to protect the educational rights and interests of children with disabilities. With respect to the boundaries of third-party standing under the IDEA, § 1415 establishes the required procedures in subsection (b) as the floor and Article III as the ceiling. Within that range, Congress has deferred to the judgment of the states and localities.

(Pet. App. 15a). School City does not directly challenge this proposition by its Petition. Nor could it, since there is no authority to the contrary.

D. The USDOE Memorandum Did Not Address The Seventh Circuit's Decision

Petitioner misrepresents the substance and purpose of the USDOE's March 22, 1994, memorandum (Pet. App. 88-96a). The USDOE explicitly stated the main purpose of that correspondence:

> The purpose of this memorandum is to call to your attention the requirements for State complaint procedures that are set out in §§ 300.660-300.662 of the final Part B regulations. We wanted to highlight these procedures, because they contain a number of **additional** requirements that State education agencies (SEAs) must implement – which were not required in past years, when the complaint procedures were included in the Education Department General Administrative Regulations (EDGAR).

(*Id.* at 88a; emphasis in original). The memorandum's primary focus is on the changes to the EDGAR requirements since they were removed from EDGAR and similar requirements were added to the IDEA regulations. These changes are set forth by the USDOE and highlighted in boldface type (*Id.* at 89-91a).

Nowhere does the USDOE memorandum mention the Seventh Circuit's decision in this case, either directly or indirectly. Nowhere does it mention the issue of

whether third parties can initiate IDEA due process procedures or whether and why a state would issue regulations to allow them to do so. Contrary to the misrepresentation of the Petitioner, there is no emphasis at all keeping out third parties from IDEA due process proceedings. Rather, the emphasis is on the availability of both the "complaint management" system and the "impartial due process hearing" mechanisms for parents: "Under Part B regulations, parents of children with disabilities have two separate means available to them for resolving disputes with public agencies concerning the education of their children. . . . " (*Id.* at 91a).

In short, the USDOE memorandum is not a response to the Seventh Circuit's decision in this case. The USDOE certainly makes no statement that could be interpreted to suggest the Seventh Circuit was wrong in its interpretation of Indiana's Rule 15 "due process" regulations. At most it could be interpreted as a message to the states to adopt proper EDGAR regulations in addition to their IDEA due process regulations.

The Seventh Circuit did not hold that every state has expanded access to the IDEA due process system to third parties such as FCC. The court merely ruled that Indiana did. If Indiana or its Department of Education now wishes its regulations to read differently, the Indiana Department of Education can amend its regulations without need for legislative or judicial approval.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 94-116

In The

Supreme Court of the United States

October Term, 1994

SCHOOL CITY OF MISHAWAKA,

Petitioner,

v.

FAMILY & CHILDREN'S CENTER, INC.,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

APPENDIX TO BRIEF FOR THE RESPONDENT IN OPPOSITION

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9 *Indiana Administrative Code*, Titles 511 to 635 (1992 ed.):

511 IAC 7-1-7 Complaints; investigation
Authority: IC 20-1-1-6; IC 20-1-6-14
Affected: IC 20-1-6

Sec. 7. COMPLAINT PROCEDURES. Complaints concerning the implementation of, this Rule shall be investigated by the Division of Special Education of the Department of Public Instruction in accordance with the following procedures.

The Division of Special Education shall designate specific individuals who hold appropriate special education licensing, who are employed within the Division and who shall be responsible for investigating and acting on any allegations which may be made by public agencies, or private individuals, or organizations, of actions taken by any public agency that are contrary to the requirements of free appropriate public education as defined on page 3 of this Rule *[511 IAC 7-1-(J)]*.

The person conducting the investigation shall have the responsibility to provide for negotiations, technical assistance activities, and other remedial action to achieve compliance.

Within forty (40) school days of the initiation of a complaint, the person who is conducting the investigation shall file a final written response with the complainant, the superintendent of the school involved and the State Director of Special Education.

The response shall be binding on all parties and the parties have thirty (30) school days from the receipt of the response to achieve compliance.

Failure to achieve compliance shall result in withholding of State and Federal funds.

The response to the complaint may be appealed to the Commission on General Education by any of the parties. *(Indiana State Board of Education; Rule S-1, Sec VII; filed Aug 25, 1978, 4:40 pm: 1 IR 698) NOTE: Transferred from the commission on general education (510 IAC 7-1-7) to the Indiana state board of education (511 IAC 7-1-7) by P.L. 20-1984, SECTION 206, effective July 1, 1984.*

Indiana Register, Vol. 15, No. 4 (Jan. 1, 1992), pp. 505-58:

TITLE 511 INDIANA STATE BOARD OF EDUCATION

LSA Document #91-69(F)

DIGEST

Adds 511 IAC 7-3, 511 IAC 7-4, 511 IAC 7-5, 511 IAC 7-6, 511 IAC 7-7, 511 IAC 7-8, 511 IAC 7-9, 511 IAC 7-10, 511 IAC 7-11, 511 IAC 7-12, 511 IAC 7-13, 511 IAC 7-14, 511 IAC 7-15, and 511 IAC 7-16 to implement the provisions of the Individuals with Disabilities Education Act, also known as P.L.94-142. Repeals 511 IAC 7-1 and 511 IAC 7-2. Effective 30 days after filing with the secretary of state.

* * *

SECTION 13. 511 IAC 7-15 IS ADDED TO READ AS FOLLOWS:

Rule 15. Due Process Procedures

511 IAC 7-15-1 Suspension

* * *

511 IAC 7-15-2 Expulsion

* * *

511 IAC 7-15-3 Mediation

* * *

511 IAC 7-15-4 Complaints
Authority: IC 20-1-1-6; IC 20-1-6-14
Affected: IC 20-1-6

Sec. 4. (a) Any individual, group of individuals, agency, or organization may file a complaint alleging violations of federal or state laws that apply to special education programs. The complaint shall:

(1) be in writing;

(2) indicate the allegations of the technical violation and the circumstances on which the allegations are based;

(3) be signed by the complainant; and

(4) be submitted to the division of special education.

(b) The division of special education shall develop and implement written procedures to investigate complaints. These procedures shall be available upon request and shall include the following:

(1) A system to follow when complaints are received by the division of special education office including the following:

(A) Determination of the issues.

(B) Assignment of an individual to investigate and monitor compliance.

(2) The time lines for the investigation, issuance of a report, and monitoring compliance.

(c) The individuals assigned as complaint investigators shall be trained employees of the department of education, or other state agencies, as appropriate.

(d) The investigation of a complaint may involve off-site and on-site investigation procedures. The complaint investigator shall have the following responsibilities:

(1) Contacting the complainant and the public agency named in the complaint to clarify the issues, if necessary.

(2) Determining what investigation procedures will be necessary and notifying both parties regarding those procedures.

(3) Conducting the investigation.

(4) Filing a written response with the following:

(A) The complainant.

(B) The superintendent or chief executive officer of the public agency involved.

(C) The special education program administrator of the special education planning district involved.

(D) The director of the division of special education.

(E) The designated administrator of the state agency responsible for the administration and operation of the state agency programs, if appropriate.

(5) Facilitating, or providing for, negotiations between the parties, if necessary.

(6) Providing technical assistance to assist in achieving compliance.

(e) The final written response of the complaint investigator shall be filed within thirty (30) calendar days of the date the written complaint is received. An extension of time may be granted by the director of the division of special education only if exceptional circumstances exist with respect to a specific complaint. In that event, all

parties shall be notified in writing of the extension and the reasons for it.

(f) Orders issued by the complaint investigator shall be binding on the public agency unless appealed by the public agency. The time liens for the public agency to submit a corrective action plan and to achieve compliance shall be included in the complaint investigator's report. Compliance with orders issued by the complaint investigator shall be monitored by the division of special education.

(g) Failure of the public agency to achieve compliance with orders issued by a complaint investigator shall result in the withholding of federal and state funds to the public agency.

(h) Either the public agency or the complainant may request reconsideration by the director of the division of special education of any part of a complaint report. A request for reconsideration must be filed within fifteen (15) calendar days of the date the complaint report is received by the public agency and the complainant. The request for reconsideration shall:

(1) be sent to the director of the division of special education;

(2) be in writing, with a copy sent to the other party; and

(3) state the specific portions of the report the party believes should be reconsidered with specific reasons to support the request.

(i) Reconsideration of a complaint report shall be conducted by the director of the division of special education. Written notice of the result of that reconsideration shall be issued within fifteen (15) calendar days of the date the request for reconsideration is received by the director of the division of special education.

(j) Any party disagreeing with the result of the reconsideration by the director of the division of special education may appeal to the Secretary of the United States Department of Education. Either party disagreeing with the decision of the Secretary of the United States Department of Education may appeal to a civil court with jurisdiction. *(Indiana State Board of Education; 511 IAC 7-15-4; filed Dec 9, 1991, 8:30 a.m.)*

511 IAC 7-15-5 Due process hearings

* * *

511 IAC 7-15-6 Due process hearing appeals

* * *

SECTION 15. THE FOLLOWING ARE REPEALED: 511 IAC 7-1; 511 IAC 7-2.

LSA Document #91-69(F)
Proposed Rule Published: July 1, 1991; 14 IR 1883
Hearings Held: July 24, 1991 and July 25, 1991
Approved by Attorney General: Deemed approved by the Attorney General without signature under IC 4-22-2-32 on November 17, 1991
Approved by Governor: December 6, 1991
Filed with Secretary of State: December 9, 1991, 8:30 a.m.
Incorporated Documents Filed with Secretary of State: ANSI-1969.

Arizona Administrative Code, Title 7, Ch. 2 (Supp. 12/31/93):

R7-2-804. Compliance with federal statutes or regulations

A. This rule prescribes procedures to be used in filing and processing written complaints alleging the failure of a public agency or school district to comply with federal statutes or regulations applicable to federal education programs conducted and subject to Title 34, Code of Federal Regulations, § 76.780.

B. The Arizona Department of Education (Department) shall accept and investigate complaints provided that the complaint:

1. Is written and signed by the complaining party or his or her designated representative;

2. Sets forth the facts forming the basis of the complaint; the facts set forth in the complaint, if true, could constitute noncompliance by a public agency or school district;

C. Upon receipt of a complaint setting forth the criteria contained in (B), the Department shall immediately begin an impartial review which may include on-site investigations. If in the course of the review it is determined that the nature of the complaint is not a matter of noncompliance, the complainant will be so informed and advised of appropriate means of resolving the complaint.

D. A written decision with specific findings shall be issued by the Department within 60 calendar days of receipt of the written complaint. If corrective action is required, such action shall be designated in the

decision and shall include the time line for correction and possible consequences for continued noncompliance. A copy of the written decision shall be sent to the complaining party and the agency involved on or before the expiration of the 60-day period. An extension of this timeline will be permitted only if exceptional circumstances exist with respect to a particular complaint.

E. If there appears to be a failure or refusal to comply with the applicable law or regulations, and if the noncompliance or refusal to comply cannot be corrected or avoided by informal means, compliance shall be effected by the Superintendent and the State Board of Education by any means authorized by law or by rule and regulation. The Superintendent shall retain jurisdiction over the issue of noncompliance with the law or regulations and shall retain jurisdiction over the implementation of any corrective action required. However, nothing herein shall preclude the availability of an informal resolution between the complainant and the agency or school district involved, nor shall this rule preclude the availability of any administrative hearing remedies to resolve such disputes or judicial review of such administrative remedies.

F. If, pursuant to an investigation by the Department, the Superintendent finds a failure to comply with applicable law or regulations, he or she shall so inform the agency or school district and compliance shall be obtained by informal means whenever possible. If corrective action is required, such action shall be designated in this decision and shall include the time lines for correction and the possible consequences for continued noncompliance.

G. A summary of each complaint received and investigated by the Department and the decision of the

Superintendent shall be submitted annually to the State Board of Education for informational purposes only. Any personally identifiable information shall be deleted from the report to the State Board of Education.

H. The complainant may request the U.S. Department of Education to review the final decision of the Superintendent. The Department shall inform a complainant of the procedures for requesting a review by the U.S. Department of Education.

Supreme Court, U.S.
FILED
OCT 11 1994
OFFICE OF THE CLERK

NO. 94-116

In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

SCHOOL CITY OF MISHAWAKA,
Petitioner
v.

FAMILY AND CHILDRENS CENTER, INC.,
Respondent

On Petition for a Writ of Certiorari to the
United State Court of Appeals for the Seventh Circuit

PETITIONER'S REPLY MEMORANDUM

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ARGUMENT

The intellectual linchpin of Respondent's entire argument is based on the statement "[c]ertainly, 511 IAC 7-1-7, the predecessor to the subject regulation, 511 IAC 7-15-4, was not enacted pursuant to EDGAR [the Education Division General Administrative Regulations]" and the conclusion that it must therefore have been enacted under the due process provisions of 20 U.S.C. §1415(b). (Res.Br., 11) In response the Petitioner would show the Court that although it is true that 511 IAC 7-1-7 was not and could not have been promulgated under EDGAR, EDGAR also had predecessor regulations and 511 IAC 7-1-7 was promulgated under those predecessor regulations, not the due process provisions contained in what is now

20 U.S.C. §1415(b). Furthermore, 511 IAC 7-15-4 was clearly promulgated under EDGAR.

A. Contrary to Respondent's suggestion, the predecessor statute to 511 IAC 7-15-4, 511 IAC 7-1-7, was promulgated under the authority of EDGAR's predecessor regulations to provide a program specific complaint investigation procedure, not the due process hearing procedure mandated under 20 U.S.C. §1415(e), and 511 IAC 7-15-4 was promulgated under EDGAR.

In order to correct Respondent's misstatement regarding 511 IAC 7-15-4 and its predecessor 511 IAC 7-1-7, it is necessary to briefly review the history of federal involvement in the education of the disabled and the response of Indiana and other states to that federal involvement. In 1966 via Pub.L. 91-230, Congress added Title VI to the Elementary and Secondary Education Act of 1965, Pub.L. 89-10 ("ESEA")(20 U.S.C. 2701 et seq.). The purpose of Title VI was to create a Bureau of Education for the Handicapped to provide leadership to states in educating the handicapped. In 1968 Congress again amended the ESEA creating certain detailed procedural requirements to be imposed upon the states in exchange for the receipt of federal funds under the ESEA. These detailed requirements were the General Education Provisions Act ("GEPA"), Pub.L. 90-247, 81 Stat. 783, 20 U.S.C. §1232. These requirements applied to all federally funded educational programs including Title VI.

In 1970, Congress revisited the ESEA, repealing Title VI and creating a new act, the Education of the Handicapped Act, Pub.L. 91-230 ("EHA"). Under the EHA, any state that wished to receive

federal funding was required to adopt certain detailed procedural requirements including a due process hearing procedure for parents to use in challenging their children's educational placements. In Indiana these procedures were enacted as Rule S-1 on September 13, 1973. Section 2 of Rule S-1 enacted on September 13, 1973, contained a due process procedure which was available only to parents, guardians, surrogate parents and children. (Pet.Rep.App. 1) The due process hearing procedures contained in Section 2 of Rule S-1 are the predecessor regulations to 511 IAC 7-1-3(g) which is the predecessor to 511 IAC 7-15-5. Rule S-1 contained no complaint investigation procedure as none was required under the ESEA or the EHA. (Id.)

In 1975 Congress again revisited the issue of the education of the handicapped and passed the Education for All Handicapped Children Act, Pub.L. 94-142, as amended 20 U.S.C. §1400 et seq. ("EAHCA"). Pursuant to Congressional mandate, on August 23, 1977, the Office of Education, Department of Health Education and Welfare (hereinafter "HEW") promulgated final regulations intended to implement the requirements of the EAHCA and "to assure that the rights of handicapped children and their parents are protected." 42 Fed.Reg. 42474 (1977) As with its predecessor, the EAHCA also required, in exchange for the receipt of federal funds, the states to adopt detailed due process hearing rights available to parents, guardians, surrogate parents, and children. These provisions were contained in "**Subpart E-Procedural Safeguards**-Due Process Procedures for Parents and Children." 45 CFR §§121a.500-121a.5-14; 45 Fed.Reg. 42494-42496 (1977)[1] However, the administrative regulations enacted under the EAHCA departed from their predeces-

[1] These regulations are the predecessor to the current due process hearing procedures enacted by the United States Department of Education under the IDEA, 34 CFR §§300.500-300.515.

sors in that they also contained a new procedure, **"Subpart F-State Administration-**State Education Agency Responsibilities: General" which provided as follows:

> **"§121a.602 Adoption of complaint procedures.**
>
> (a) Each State educational agency shall adopt effective procedures for reviewing, investigating, and acting on any allegations of substance, which may be made by public agencies, or private individuals, or organizations, of actions taken by any public agency that are contrary to the require ments of this part.
>
> (b) In carrying out the requirements in paragraph (a) of this section, the State educational agency shall:
>
> (1) Designate specific individuals within the agency who are responsible for implementing the requirements;
>
> (2) Provide for negotiations, technical assistance activities, and other remedial action to achieve compliance; and
>
> (3) Provide for the use of sanctions, including the withholding of Part B funds in accordance with §121a.194.
>
> (20 U.S.C. 1412(6))"

42 Fed.Reg. 42501 (1977).

In accordance with these regulations, and in order to continue to qualify to receive federal funds, on August 25, 1978, Indiana modified Rule S-1 and recodified it at 511 IAC 7-1-1. The due process hearing procedures for parents, guardians, surrogate parents, and children mandated under 45 CFR §§121a.500-121a.514 were incorporated into the existing due process procedures and placed at

511 IAC 7-1-3(g). (Pet.Rep.App. 14-15) These regulations are the predecessor to the current due process hearing procedures found at 511 IAC 7-15-5. (Pet.App. 76-80) However, in addition to the modification of the due process hearing procedures, on August 25, 1978, pursuant to 45 CFR §121a.602, Indiana also enacted a process for the investigation of complaints by "public agencies, or private individuals, or organizations." This regulation, 511 IAC 7-1-7, is the predecessor to 511 IAC 7-15-4. (Res.Br. 10-11; Res.App. 1-2)

On May 4, 1979, in what was dubbed as "Operation Common Sense" HEW proposed the Education Division General Administrative Regulations ("EDGAR"). 44 Fed.Reg. 26297-26338 (1979) The newly proposed EDGAR regulations were "developed from existing general regulations, program regulations, other policy documents, and in some cases new legislation." 44 Fed.Reg. 26299 (1979)[2] §§100b.780-100b.782 of the proposed regulations governed complaint investigation procedures and incorporated the complaint procedures previously found in the EAHCA regulations, 45 CFR §121a.602. Following a comment and revision period, the final EDGAR regulations were adopted on April 3, 1980. 45 Fed.Reg. 22494 (1980) With the enactment of the comprehensive EDGAR procedures, the program specific complaint investigation procedure under the EAHCA, 45 CFR §121a.602, was repealed. Because EDGAR contained no requirement that individual states also repeal their program specific complaint investigation procedures as HEW had done, for clarity and consistency Indiana (and most other states) retained their program specific complaint investigation procedures, and the federal regulatory authority for those complaint investigation procedures simply shifted from the repealed program specific

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[2] HEW cited to GEPA as the source of its statutory authority for the EDGAR regulations. 44 Fed.Reg. 26298 (1979).

regulation (45 CFR §121a.602) to the substantially similar but non-program specific EDGAR regulations. (45 CFR §100b.780-783)[3]

As noted above, a part of the federal rulemaking process involves the solicitation of comments by the public. In connection with the promulgation of EDGAR, the following comment and response appeared:

> **"Sec. 100b.781 Minimum Complaint Procedures**
> Comment. One commenter [sic] suggested that this section not apply to due process procedures for students.
> Response. No change has been made. The minimum procedures in Sec. 100b.781 relate only to those complaints identified in Sec. 100b.780."

45 Fed.Reg. 22574-22575 (1980). Thus HEW made it clear that it believed that its regulation did not provide, as Respondent claims, the due process procedure in 20 U.S.C. §1415(e), but rather was intended to provide a separate complaint investigation process independent of the due process requirements.

The wisdom of Indiana and many other states in deciding to retain program specific complaint investigation procedures in their special education regulations became apparent in 1988 when HEW proposed deleting the EDGAR complaint investigation procedures and reverting back to program specific complaint investigation procedures:

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[3] In late 1980 the EDGAR regulations were redesignated from 45 CFR §100b to 34 CFR §76. 45 Fed.Reg. 77368 (1980).

"Sections 76.780-76-782-The Secretary proposes to remove these sections because they either do not apply to or have not been used under most programs of the Department. Most of the provisions were derived from the regulations for the State-administered program under Part B of the Education of the Handicapped Act (EHA). Those provisions of the State complaint procedure that were derived from the regulations under the EHA are proposed to transfer back to that program, which has shown the greatest need for the complaint procedure."

53 Fed.Reg. 31584 (1988).

In 1992 HEW followed through and removed the general complaint investigation procedure from EDGAR and placed it back into what had by then become the IDEA as a program specific complaint investigation procedure. The reasoning for this decision was given as follows:

"In the NPRM, the Secretary proposed to remove the State complaint procedures from EDGAR and to transfer those procedures to Part B of the Individuals with Disabilities Education Act (IDEA) (formerly, the Education of the Handicapped Act). In doing so, the Secretary noted that the complaint procedures had originated under the Part B program and that the procedures had not been used under most programs of the Department. Four of the comments received by the Department asked that the State complaint procedures be kept in EDGAR. The commenters believed that the reason that the State-administered programs other than Part B of IDEA did not use the procedures was because there was a lack of awareness about the procedures under those programs. However, the Secretary believes that

> complaint procedures are most appropriate for the following programs that focus on the special needs of individuals or are designed to assist disadvantaged children: • Part B of IDEA (34 CFR part 300) ... Thus, the Secretary has decided to remove State complaint procedures from EDGAR. The four Chapter 1 programs and the part H program listed above already include the complaint procedures contained in EDGAR. This final rulemaking document adds those procedures to the part B program."

57 Fed.Reg. 30328 (1992).

As a consequence of this, on July 8, 1992, the general complaint investigation procedures in EDGAR (34 CFR §§76.780-76.782) were repealed and once again became program specific, being again placed in Part B of the IDEA regulations at 34 CFR §§300.660-300.662. (Pet.App. 68-69) During this same period of time Indiana was also revising its own Rule S-1. As noted in Respondent's Brief, Rule S-1 was repealed effective January 8, 1992, and was replaced with a new set of special education regulations, 511 IAC 7-15-1 et seq. (Res.Br. 11; Res.App. 3, 7) As part of these amendments, given the pendency of the proposed rulemaking by HEW, Indiana chose to retain its program specific complaint investigation procedures and thus 511 IAC 7-1-7 was recodified at 511 IAC 7-15-4 with the purpose, as noted by HEW in its proposed rulemaking, of ensuring full implementation of Part B of the IDEA. 15 Indiana Register 505 (Res.App. 3) However, since the recodification took place while EDGAR was still in effect, 511 IAC 7-15-4 was implemented under EDGAR, not IDEA. However, following the repeal of the EDGAR general complaint investigation procedures on July 8, 1992, in favor of program specific complaint investigation procedures, the authority for 511 IAC 7-15-4 shifted back to the IDEA. This is simply the reverse of

what had happened to its predecessor 511 IAC 7-1-7 when EDGAR first went into effect in 1980.

The simple fact is, contrary to Respondent's assertion, since 1973 Indiana, like all other states, in exchange for receiving federal funds to assist in the education of the disabled, has had a due process hearing procedure open and available for use by parents, guardians, surrogate parents and children as mandated by 20 U.S.C. §1415(b) and (e) and its predecessor statutes and regulations. This due process hearing procedure first appeared in Indiana in 1973 in Rule S-1 (Pet.Rep.App. 1), then in 1978 became 511 IAC 7-1-3(g) (Pet.Rep.App. 14-15), and eventually in 1992 became 511 IAC 7-15-5. (Pet.App. 76-80) In addition to this due process hearing procedure, since 1978, Indiana, like all other states, has also had a separate unrelated program specific complaint investigation procedure open to any organization or individual as mandated by the 1977 EAHCA regulations (45 CFR §121a.602). This complaint investigation procedure as first promulgated at 511 IAC 7-1-7 passed in 1978, then in 1992 became 511 IAC 7-15-4 under the EDGAR regulations. Because the differing legislative and administrative histories clearly show that 511 IAC 7-15-4 and its predecessors were never promulgated or utilized to fulfill the role of the due process hearing procedures required under 20 U.S.C. §1415(b) and (e), the linchpin of Respondent's entire argument fails.

CONCLUSION

Because the predecessor regulation to 511 IAC 7-15-4, 511 IAC 7-1-7, was promulgated under the authority of EDGAR's predecessor regulations to provide a program specific complaint investigation procedure, not the due process hearing procedure

mandated under 20 U.S.C. §1415(b)and (c)[4], the issue before this Court is not one unique to Indiana regulatory law. Rather, the issues before this Court are those of national import noted in the Petition, i.e., whether the Seventh Circuit erred in utilizing a program specific complaint investigation regulation to grant the Respondent standing to utilize the due process hearing provisions of 20 U.S.C. § 1415(b) and (e). This issue, as noted in the Petition and the Amici briefs, is one of national import affecting all states with similar regulations, and one in which there is a clear conflict in the circuits warranting review by this Court.

Respectfully submitted,

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[4] The fact that Indiana's program specific complaint investigation procedure grants a right of judicial review is irrelevant to this case as the Respondent filed suit in federal court and Indiana's regulation cannot confer jurisdiction on the federal courts. Rather the Respondent could have (and had they read the regulation carefully should have) filed the request for administrative review in an Indiana court of competent jurisdiction under the Indiana Administrative Procedures Act, I.C. 4-21.5-5-1 et seq., not in federal court under the IDEA.

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On Petition for a Writ of Certiorari to the
United State Court of Appeals for the Seventh Circuit

APPENDIX TO THE PETITIONER'S REPLY MEMORANDUM

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Rule S-1: Section 2

(20-1-6-3)-2. **Program specifications.**--Programs to be approved under the provisions of these statutes [Rules (20-1-6-3)-1--(20-1-6-3)-24] shall provide instruction for pupils between six [6] and eighteen [18] years of age inclusively, and may provide programs for pupils between the ages of three [3] and six [6], and eighteen [18] and twenty-one [21], and who are not in attendance in any of the residential schools of the state. Special education programs for deaf students may be approved for children as young as six [6] months of age.

The determination of the proper educational program for a student is the responsibility of the school superintendent. Specialists from the school staff, consultants or parents shall assist in providing and interpreting appropriate information. After determination of proper educational program for a student is made by the school superintendent with proper advice from specialists and consultants of the school staff, written permission of the parent or guardian must be obtained before the child is officially assigned to a special education class.

To be fully effective, educational programming for students who may benefit from special education placement requires a team effort involving parents, teachers, school administrators, and specialists. Teamwork of this kind rests upon mutual trust and frequent communication; therefore, it shall be the responsibility of the superintendent of the local school corporation to make certain that the parents (or legal guardian) of any pupil referred for any specific, individual tests which are intended to determine cause, extent or possible remediation of suspected learning difficulty are fully

informed of the referral and the reasons for the referral before any such tests are administered. Such information must be presented to the parent (or legal guardian) in a personal interview by a person designated by the superintendent of the school corporation of which the child is a resident. The written consent of the parent or legal guardian must be obtained before any such tests are administered. If a personal interview for the purpose of informing the parent or legal guardian of the referral is refused by the parent or legal guardian, the superintendent or his representative may then inform the parent or legal guardian by mail.

Preliminary group screening tests concerning physical health or mental ability which are administered to all students do not require a personal interview.

No child shall be excluded from or transferred out of a regular public school assignment unless such child is provided (a) free and adequate alternative educational service suited to the child's needs and (b) written notice, an opportunity for a constitutionally adequate prior hearing and periodic review of the child's status and the adequacy of any educational alternative.

The superintendent or his designee of the school attended by the child shall convoke a case conference committee to consider the appropriate educational placement for that child. The case conference committee shall be composed of appropriate school administrators, specialists, special education teachers, and/or regular education teachers who may have knowledge of the child and the parents of the child being considered for special education programs. unless the parents choose not to participate.

The case conference committee coordinator shall make arrangements for: (a). the assembly of all relevant data and reports concerning the child and, (b). the administration of further tests and evaluations to aid in assessing the educational needs of the child.

Provided That: No pupil shall be compelled to submit to medical examination whose parent objects, in writing, to such examination.

Within sixty [60] days of the initial request or recommendation, the full committee must meet, having been provided with all relevant reports and data prior to said meeting, and recommend an educational program for the child. A report embodying that recommendation and the reasons therefor shall be prepared by the coordinator and shall be forwarded to the local school superintendent or his designee within twenty [20] days of the case conference meeting. The superintendent shall provide for the special educational needs of the child by way of an educational placement as close to the norm as possible.

The superintendent shall prepare a report which includes both the placement proposed and a statement of reasons therefor, a copy of which shall be sent to the child's parents. Accompanying said report to the child's parents there shall be a notice of the right to a hearing before a hearing officer if there is an objection to the placement. Whenever the superintendent proposes to take action regarding a child's special education placement, denial of placement, or transfer, the child's parent or guardian shall be informed by written notice of said proposal. If the parent or guardian opposes the proposal, he shall make a written demand for a hearing. Such hearing must be conducted within twenty to forty-five [20-45] days after the demand. Pending the outcome of the hearing, the child must be provided with

interim educational services. In carrying out the above, the following procedures shall be followed.

(i). If the child is not currently provided with a free educational program, he shall be provided with the program deemed suitable by the local school system staff pending a decision by the hearing officer pursuant to this procedure. If the child is already being provided with a free educational program, changes to which the parents or guardians object shall not be made pending the hearing decision.

(ii). Notice required hereinbefore shall be given in writing by registered mail to the parent or guardian of the child.

(iii). Such notice shall:

(a). describe the proposed action in detail,

(b). clearly state the specific and complete reasons for the proposed action, including the specification of any tests or reports upon which such proposed action is based;

(c). describe any alternative educational opportunities available on a permanent or temporary basis;

(d). inform the parent or guardian of the right to object to the proposed action at a hearing before an independent hearing officer, and of the manner in which to request such a hearing;

(e). inform the parent or guardian that the child may be tested for an independent medical, psychological and educational evaluation and specify the name, address and telephone number of an appropriate local diagnostic center;

(f). inform the parent or guardian of any organizations providing assistance with respect to placement questions;

(g) inform the parent or guardian of the right to be represented at the hearing by legal counsel; to examine and copy the child's school records at any time during regular office hours, including any tests or reports upon which the proposed action may be based to present evidence, including expert medical, psychological and educational testimony; and, to confront and cross-examine any school official, employee, or agent of the school district or public department who may have evidence upon which the proposed action is based.

(iv). The hearing shall be at a time and place reasonably convenient to such parent or guardian, and shall be scheduled not sooner than twenty [20] days nor later than forty-five [45] days after the receipt of a request from the parent or guardian.

(v). The hearing shall be closed to the public unless the parent or guardian requests an open hearing.

(vi). The child and his parent or guardian are guaranteed the right to a lawyer or other representative of their own choosing. If they are unable, through financial inability, to retain counsel, the superintendent shall advise the child's parent or guardian of available voluntary legal assistance.

(vii). The decision of the hearing officer shall be based solely upon the evidence presented at the hearing.

(viii). The local school corporation shall bear the burden of proof as to all facts and as to the appropriateness of any placement, denial of placement or transfer.

(ix). A tape recording or other verbatim record of the hearing shall be made, and upon request shall be transcribed and made available to the parent or guardian or his representative.

(x). At a reasonable time prior to the hearing (and at any other time during regular business hours), the parent or guardian, or his counsel, shall be given access to all records of the public school system and any of its agents or employees pertaining to the child, including any tests or reports upon which the proposed action may be based.

(xi). The independent hearing officer shall be designated by the state superintendent of public instruction and shall not be an officer, employee or agent of the local school system or the local board of education.

(xii). Costs pertaining to the hearing officer shall be paid by the local school corporation.

(xiii). The parent or guardian, or his representative, shall have the right to compel the attendance of, to confront, and to cross-examine any witness testifying for the public school system or any public employee who may have evidence upon which the proposed action may be based.

(xiv). The parent or guardian, or his representative, shall have the right to present evidence and testimony, including expert medical, psychological or educational testimony.

(xv). Within thirty [30] days after the hearing, the hearing officer shall render a decision in writing. Such decision shall include findings of fact and conclusions of law and shall be sent by registered mail to the parent or guardian and his counsel.

(xvi). Appeals of any kind in reference to Rule S-1 [(20-1-6-3)-1 -- (20-1-6-3)-24] may be made to the state board for special education appeals after procedures set out in this document are followed.

[State Bd. of Educ., Comm. on Gen. Educ., Rule S-1, §2, adopted Sept. 6, 1973, filed Sept. 13, 1973.]

511 IAC 7-1-3 Identification and placement; testing; case conference committee

Authority: IC 20-1-1-6; IC 20-1-6-2
Affected: IC 20-1-6; IC 20-8.1-5

Sec. 3. Programs to be approved under the provision of 510 IAC 7-1 [511 IAC 7-1] shall provide instruction for students as stated in IC 20-1-6-1.

(a) Protection of rights. The Indiana department of public instruction will insure that the rights of a student are protected by:

(1) Maintaining a registry of persons, excluding employees of public agencies involved in the education or care of the student, who are willing to be duly appointed to act as surrogate parent in connection with a child's educational placement and program when the child's parent is unknown, unavailable, or when the child is a ward of the state. These persons' names are to be transmitted upon the request of courts making appointments in accordance with Indiana law;

(2) Entering into memoranda of understanding with public agencies and departments to the extent necessary to assign duties with respect to:

(A) locating apparently unknown or unavailable parent; and

(B) ascertaining the need for and initiating appropriate legal proceedings to obtain the appointment of a parent;

(3) Providing training to persons appointed to act as surrogate parent concerning applicable education laws and rules so that such persons may obtain the knowledge and skills necessary for adequate representation of children; and

(4) Assuring that local school systems will insure that the rights of a child are protected by:

(A) exercising due diligence in locating the apparently unknown or unavailable parent, utilizing the assistance of other public agencies, as may be necessary and in accordance with any memoranda of understanding entered into by the state department of public instruction;

(B) appointing a surrogate parent for any child in the legal custody of, or who is a ward of, a child-placing agency licensed by the state department of public welfare or a department of public welfare; and

(C) providing notices and information in accordance with 510 IAC 7-1 [511 IAC 7-1] and, in particular, providing such information about the child to the surrogate parent as may be necessary to enable him/her to represent the child's interests adequately.

(b) Referral. Referral of any child for an educational evaluation may be generated by the child, parent, teacher(s), school administrator(s) and/or specialist(s). Such a referral may be initiated to determine cause, extent, or possible remediation of suspected learning difficulties or handicapping conditions. Such a referral shall proceed in a manner consistent with the school's referral process. The referral shall be dated as to the time of its initiation, and shall include documentation of any attempts to remediate the learning difficulty of the child.

(c) Permission for testing. It shall be the responsibility of the superintendent of the school to make certain that the parent of any child referred for any educational evaluation is fully informed of the referral and the reasons for the referral before any individual tests included in the educational evaluation are administered. Such information must be presented to the parent in a personal interview by a person designated by the superintendent of the school of which

the child is a resident. The personal interview will be accompanied by written notice which shall:

(1) describe the referral, reasons for the referral, proposed assessment techniques, a timetable for evaluation and the case conference commiteee [sic.] meeting;

(2) describe any options considered and the reasons why those options were rejected;

(3) describe any alternative educational opportunities available on a permanent or temporary basis;

(4) describe any other factors relevant to the proposed evaluation;

(5) Inform the parent of the opportunity to meet with the superintendent or his/her designee and/or the local board of education to attempt to resolve any objections;

(6) inform the parent of the right to object to the proposed action at a hearing before an independent hearing officer, and of the manner in which to request such a hearing;

(7) inform the parent that the parent may obtain an indepen dent educational evaluation;

(8) inform the parent of any organizations providing assistance with respect to evaluation questions;

(9) inform the parent of the right to be represented at the hearing by legal counsel; to present evidence, including expert medical, psychological, and educational testimony; and to confront, cross-examine, and compel the attendance of witnesses who may have evidence upon which the proposed action is I based;

(10) inform the parent of the right to examine and copy the child's school records at any time during regular office hour~, including all tests and reports with respect to identification, evaluation, and educational placement, and provision of a free appropriate public education;

(11) inform the parent of the right to have access at the local level to all federal and state laws and rules pertaining to special education; and

(12) inform the parent of all of the procedural safeguards available regarding protection in evaluation procedures, least restrictive environment, confidentiality of information, and all other due process procedures.

Written notice and personal interview shall be in the parents' native language or other mode of communication. The written consent of the parent must be obtained before any such tests are administered. If a personal interview for the purpose of informing the parent of the referral is refused by the parent, or in the case of a speech-language evaluation, the superintendent or his/her designee shall then inform the parent by mail.

(d) Case conference committee and coordinator. The superintendent of the school attended by the child or his/her designee shall appoint a case conference committee and coordinator when written parent consent for individual testing has been obtained. The case conference committee coordinator shall make arrangements for:

(1) the organization and scheduling of the case conference committee;

(2) consulting with the parent regarding the appointment to the case conference committee of any individual(s) desired by the parent;

(3) the administration of tests and evaluations to aid in assessing the educational needs of the child; and

(4) the assembly of all relevant data and reports concerning the child.

(e) Educational evaluation. The evaluation of the child to aid in assessing his/her educational needs and the assembly of all relevant data and reports concerning the child shall be conducted in such a manner that the following safeguards are observed:

(1) tests and other evaluation materials are provided and conducted in the child's native language or other mode of communication;

(2) tests and other evaluation materials have been validated for the specific purpose for which they are used;

(3) tests and other evaluation materials are administered by appropriately licensed personnel in conformance with the instructions provided by the producer;

(4) tests and other evaluation materials shall include such materials designed to assess specific areas of educational need and not merely those which are designed to provide a single general intelligence quotient;

(5) tests and other evaluation materials which are administered to a child with impaired sensory, manual or speaking skills must be capable of yielding results which accurately reflect the child's aptitude or achievement level or whatever other factors the materials purport to measure, rather than reflecting the child's impaired sensory, manual, or speaking skills (except where those skills are the factors which the materials purport to measure);

(6) no single procedure is used as the sole criterion for determining an appropriate educational program for a child;

(7) the educational evaluation is made by a multidisciplinary team or group of persons, including at least one (1) teacher or other specialist with knowledge in the area of suspected disability; and

(8) the child is assessed in all areas related to the suspected disability, including, where appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities.

In interpreting evaluation data and in making placement decisions, the case conference committee shall draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior. Information from all these sources shall be documented and considered.

(f) Case conference committee meeting. The parent shall be given adequate notice, in his/her native language, of the date, time and place of the meeting. The school must have a record of its attempts to arrange the meeting at a mutually agreed upon date, time and place such as:

(1) detailed records of telephone calls made or attempted and the results of the calls;

(2) copies of correspondence sent to the parent and any responses received; and

(3) detailed records of visits made to the parent's home or place of employment and the results of the visits.

The notice will include general information about the case conference committee, including:

(1) the purpose of the meeting;

(2) a listing of the expected participants and notice that the parent may request the participation of and/or be accompanied by any other individual(s) of the parent's choosing; and

(3) a listing of the collected data to be discussed.

The school shall take whatever action is necessary to insure that the parent understands the proceedings at the meeting, including arranging for an interpreter for a parent who is deaf or whose native language is other than English. Within forty (40) school days of the initiation of the referral, the full committee must meet. If the child's parent cannot attend, the school shall use other methods to insure parental participation, including individual or conference telephone calls. Having been provided with all relevant reports and data at the

meeting, the committee will interpret the evaluation data and results, will determine appropriate placement options which provide the least restrictive environment for the child, and will determine necessary related services. A report embodying the individualized education program, a description of each evaluation procedure, test, record, or report used as a basis for the program, dissenting opinions, if any, and appropriate placement options shall be prepared by the case conference coordinator. This report shall be forwarded to the school superintendent or his/her designee within ten (10) school days of the case conference committee meeting. The determination of the proper educational program for a child is the responsibility of the superintendent or his/her designee. Utilizing the case conference committee's report, the superintendent or his/her designee shall provide for the special educational needs of the child through a determination of available resources and those additional resources which must be established for appropriate individual programming. Within ten (10) school days of the superintendent's receipt of the case conference committee's report, written notice of the superintendent's proposal shall be presented to the parent. Such notice shall be written in common, understandable language and in the parent's native language or other mode of communication. Accompanying such notice to the child's parent, there shall be written notice which shall:

(1) include a description of all evaluation procedures, tests, records, or reports used as a basis for the program, dissenting opinions, if any, and a placement recommendation.

(2) explain the reasons for the placement recommendation including a description of any options considered and the reasons why those options were rejected;

(3) describe any alternative educational opportunities available on a permanent or temporary basis:

(4) describe any other factors relevant to the proposed placement;

(5) inform the parent of the opportunity to meet with the superintendent or his/her designee and/or the local board of education to attempt to resolve any objections;

(6) inform the parent of the right to object to the proposed action at a hearing before an independent hearing officer, and of the manner in which to request such a hearing;

(7) inform the parent that the parent may obtain an indepen dent educational evaluation;

(8) inform the parent of any organizations providing assistance with respect to placement questions;

(9) inform the parent of the right to be represented at the hearing by legal counsel; to present evidence, including expert medical, psychological, and educational testimony; and to confront, cross-examine, and compel the attendance of witnesses who may have evidence upon which the proposed action is based;

(10) inform the parent of the right to examine and copy the child's school records at any time during regular office hours, including all tests and reports with respect to identification, evaluation, and educational placement, and provision of a free appropriate public education;

(11) inform the parent of the right to have access at the local level to all federal and state laws and rules pertaining to special education; and

(12) inform the parent of all the procedural safeguards available regarding protection in evaluation procedures, least restrictive environment, confidentiality of information, and all other due process procedures.

Whenever the superintendent or his/her designee proposes or refuses to take action regarding initiation, change, or denial of identification, evaluation or educational placement of the child or the provision of a free appropriate public education for the child, the child's parent

shall be informed by written notice in his/her native language of such proposal or refusal. The written notice shall include the information embodied in subdivisions (f)(1) to (f)(12). The written consent of the parent must be obtained before action is taken regarding a child's special education placement or transfer. If the parent's written consent is obtained, the proposed placement must be implemented within twenty (20) school days of the date of the notice by the superintendent or his/her designee. Placement shall be made upon receipt of the parent's written consent. If the proposed placement date falls within the last twenty (20) school days of the spring school semester, placement may be made on the first day of the following school semester.

(g) Hearing procedures. The parent or school may initiate a hearing in regard to the initiation, change, or denial of identification, evaluation or educational placement of the child or the provision of a free appropriate public education for the child. The request for a hearing and for the appointment of an independent hearing officer:

(1) shall be in writing;

(2) shall be made of and filed with the local superintendent, with a copy of the written request simultaneously filed with the state superintendent of public instruction; and

(3) shall specifically set forth the reasons for the request.

Such hearings must be conducted within twenty (20) school days after the request, and at a time and place reasonably convenient to the parent. The hearing officer may grant specific extensions of time beyond the twenty (20) school days at the request of either party. Upon receipt of such notice, the state superintendent of public instruction shall designate the independent hearing officer in writing, by letter of appointment, providing a copy of same to the parent and the school corporation. The letter of appointment shall include a copy of the written request for a hearing and shall contain such instruction, as deemed necessary or applicable, as to the scope of the

requested hearing and the hearing officer's jurisdiction relative to the conducting of the hearing.

The school shall bear all costs pertaining to the hearing, including the transcription, hearing officer's fee and expenses. The parent involved in a hearing shall be given the right to have the child who is the subject of the hearing present, and/or open the hearing to the public.

During the pendency of any administrative or judicial proceeding regarding a complaint, unless the department of public instruction or the school and the parent of the child agree otherwise, the child involved in the complaint shall remain in his/her present educational placement. The present educational placement of the child shall include normal grade advancement if the proceedings extend beyond the end of a school year. If the complaint involves and [sic.] application for initial admission to public school, the child, with the consent of the parent, shall be placed in the public school program until the completion of the proceedings.

The child and the parent are guaranteed the right to legal counsel and/or other representation of their own choosing. The school shall inform the parent of any free or low-cost legal services available in the area if the parent requests the information, or if the parent or school initiates a hearing. The decision of the hearing officer shall be based solely upon the evidence presented at the hearing. The school shall bear the burden of proof as to all facts pertaining to the appropriateness of any placement, denial of placement, or transfer.

A tape recording or other verbatim record of the hearing shall be made and transcribed, and, upon request, shall be made available to the parent or the parent's representative, at the school's ex-

pense. At a reasonable time prior to the hearing, during school office hours, the parent or the parent's counsel shall be given access to all records of the school and any of its agents or employees, pertaining to the child, including all tests and reports upon which the proposed action may be based. The parent or parent's representative and the school shall have the right to compel the attendance of, to confront, and to cross-examine any witness who may have evidence upon which the proposed action may be based. The parent or the parent's representative and the school shall have the right to present evidence and testimony, including expert medical, psychological, or educational testimony. Introduction of any evidence at the hearing that has not been disclosed to both parties at least five (5) days before the hearing is prohibited.

Within fifteen (15) school days following the hearing, the hearing officer shall render a written decision in the matter, including findings of fact and conclusions of law which will be binding on all paries. The hearing officer shall file the original of his findings, conclusions, and decision, along with the record in the case, with the board of special education appeals and shall cause fl copy of his findings, conclusions, and decision to be served upon each of the parties. The filing of the hearing officer's findings, conclusions, and decision along with the record in the case with the board of appeals shall operate to automatically transfer the case to the board of appeals. A copy of the hearing officer's findings, conclusions, and decision, with personally identifiable information deleted, shall be sent to the state advisory council on the education of handicapped children.

The dated written decision of the hearing officer shall contain a notice of the right to seek I review of the decision.

The dated written decision shall be final and implemented within twenty (20) school days following the date of the decision unless review is sought under subsection (h).

(h) Appeals.

(1) Board of Special Education Appeals. The state superintendent of public instruction shall appoint, upon confirmation by the commission on general education, a three (3) member panel which shall constitute the board of special education appeals. The members of the board shall be appointed for a three (3) year term. However the initial appointments shall be made in the following manner: one (1) member for one (1) year, one (1) member for two (2) years, and one (1) member for three (3) years, so that at no future time will all board members be simultaneously appointed. It shall be the duty of the board of appeals to conduct all appeals of special education hearings and to submit a yearly report to the commission on general education regarding problems, concerns and recommendations for special education.

(2) Contents of Record in Case--Definition. The transcript of testimony adduced and exhibits admitted before the hearing officer, together with the notice of hearing, all pleadings, exceptions, motions, requests, and papers filed, the hearing officer's findings, conclusions, and decision shall constitute the record in the case as transferred to the board of appeals.

(3) Petition for Review. Within twenty (20) school days (or such further period as the chairman may allow) from the date of filling [sic.1 with the board of appeals of the hearing officer's findings, conclusions, and dated decision, any party to the proceeding before the hearing officer may file a petition for review of the hearing officer's findings, conclusions, and dated decision, or to any other part of the record or proceedings with the board of appeals. The filing and

pendency of a petition for review shall operate to stay the effectiveness [sic.] of the decision of the hearing officer unless otherwise ordered by the board of appeals.

(4) Form of Petition for Review. The petition for review shall be in writing, shall be filed with the board of appeals, with a copy simultaneously filed with the opposing party, and shall specifically set forth the reasons for the objection of the party to the written decision of the hearing officer. The petition for review shall identify those portions of the hearing officer's findings, conclusions, and dated decision to which exceptions are taken.

(5) Reply to Petition for Review. Within ten (10) school days (or such further period as the chairman may allow) from the date on which the petition for review is filed with the board of appeals, any party to the proceeding before the hearing officer may file a reply to the petition for review. The reply to petition for review shall be in writing, shall be filed with the board of appeals, with a copy simultaneously filed with the opposing party, and shall specifically set forth the party's reply to the reasons for the objection of the opposing party to the written decision of the hearing officer.

(6) Dismissal of Petition--Waiver--Matters not Raised in the Petition for Review. Any petition for review failing to comply with requirements contained herein may be dismissed, in whole or in part, at the board of appeals' discretion. Any petition for review to any ruling, recommendation, finding, or conclusion of the hearing officer which is not specifically argued within such petition, exceptions, shall be deemed to have been waived, unless otherwise ordered by the board of appeals. Any matters not raised in the petition for review may not be included in any brief in support of the petition and exceptions, and may not be argued before the board of appeals. Any brief or reply not timely filed as

required herein may be disregarded and stricken from the record, at the board of appeals' discretion.

(7) Decision of the Board of Appeals. Within twenty (20) school days (or such further period as the chairman may allow at the request of a party for an extension of time) from the date on which the petition for review is filed with the board of appeals, the board of appeals shall conduct an impartial review of the hearing conducted by the hearing officer upon the record as a whole, shall insure that the procedures at the hearing were consistent with the require ments of due process, and the board of appeals shall:

(A) decide the matter upon the record without oral argument;

(B) decide the matter upon the record after oral argument;

(C) remand the matter to the hearing officer with instructions to reopen the record and receive further evidence; or

(D) make any other appropriate disposition of the matter.

At its discretion, the board of appeals may designate a review panel or review officer to conduct the impartial review of the hearing record and to prepare a written recommendation (in the form of findings of fact, conclusions of law, and a final order) for the board of appeals' final decision. The final decision of the board of appeals shall consist of the board of appeals' findings of fact, conclusions of law, and final order in the matter. In the event no timely and proper petition for review is filed with the board of appeals as required herein, the findings, conclusions and dated decision of the hearing officer shall automatically become the findings, conclusions, and final order of the

board of appeals and all objections and exceptions thereto shall be deemed waived.

(8) Service on Parties. Any petition, brief, or other matter permitted or required herein to be filed by any party with the board of appeals shall be, at the time of such filing with the board of appeals also furnished to all other parties to the proceeding by any method authorized by Trial Rule 4 of the Indiana rules of procedure; the preferable method of service on parties is by registered or certified mail with a return receipt.

(9) Civil Action. Any party aggrieved by the decision of the board of appeals may appeal the decision to civil court.

(i) Annual case review. The parent shall be given adequate notice, in his/her native language, of the date, time and place of the meeting. The school must have a record of its attempts to arrange the meeting at a mutually agreed upon date, time and place such as:

(1) detailed records of telephone calls made or attempted and the results of the calls;

(2) copies of any correspondence sent to the parent and any responses received; and

(3) detailed records of visits made to the parent's home or place of employment and the results of the visits.

The notice will include general information about the annual case review, including:

(1) the purpose of the meeting;

(2) a listing of the expected participants;

(3) a description of the collected data to be discussed; and

(4) notice that the parent may request the participation of and/or be accompanied by any other individual(s) of the parent's choosing.

The school shall take whatever action is necessary to insure that the parent understands the proceedings at the meeting, including arranging for an interpreter for a parent who is deaf or whose native language is other than English. The committee shall determine what, if any, additional data are required in order to assess the child's current and continuing needs. The committee shall prepare a written report recommending one of the following:

(1) retention in the program;

(2) transfer to a different level (primary, intermediate, etc.) or intensity (instructional resource service, full-time special class, etc.) of special education programming;

(3) transfer to a regular school program; or

(4) transfer to an appropriate public resource.

Recommendations (2), (3), and (4) constitute a proposed change in the child's educational placement. Accompanying notice to the parent of the change, in respect to recommendations (2), (3), or (4), there shall be written notice of parental rights as outlined in subdivisions (f)(1) to (f)(12), case conference committee meeting.

(j) Suspension or explusion [sic.]. Any handicapped child enrolled in special education programs or classes may be denied the right to attend school or to take part in any school function through suspension, expulsion or exclusion procedures as outlined in the statute regarding due process in student discipline, IC 20-8.1-5, provided however, that due process procedures shall also be observed in denying transportation and other related services. The expulsion or exclusion of any handicapped child in special education programs or classes shall be considered a change in the child's placement and shall be preceded by a meeting of the case conference committee. The case conference committee shall meet as soon after the misconduct as possible. The parent shall be given adequate notice, in his/her native language, of the date,

time and place of the meeting. The school must have a record of its attempts to arrange the meeting at a mutually agreed upon date, time and place such as:

(1) detailed records of telephone calls made or attempted and the results of the calls;

(2) copies of correspondence sent to the parent and any responses received; and

(3) detailed records of visits made to the parent's home or place of employment and the results of the visits.

The notice will include general information about the case conference committee, including:

(1) the purpose of the meeting;

(2) a listing of the expected participants and notice that the parent may request the participation of and/or be accompanied by any other individual(s) of the parent's choosing; and

(3) a listing of the collected data to be discussed.

The school shall take whatever action is necessary to insure that the parent understands the proceedings at the meeting, including arranging for an interpreter for a parent who is deaf or whose native language is other than English. The case conference committee meeting shall be chaired by the director of special education or his/her designee. Pending the outcome of the case conference committee meeting and further expulsion or exclusion proceedings, the child shall not be removed from school unless he/she presents a danger to himself/herself or others. If such a danger exists and the child is removed from school, the child shall be given homebound instruction. If the child's presence is a substantial disruption, he/she may be placed in a more restrictive environment within the school. Both homebound instruction and more restrictive placement can be initiated by the building principal on an emergency basis at the time of the misconduct, but

must be approved or disapproved by the case conference committee when it convenes to consider the cause of the misconduct. Disapproval will result in a return of the child to the placement he/she had at the time of the misconduct. Emergency homebound instruction or placement in a more restrictive environment within the school may not exceed a period of forty-five (45) calendar days, at which time the case conference committee must reconvene to consider the extension of such placement pending the outcome of the proceedings. The purpose of the case conference committee meeting shall be to determine whether or not there is a causal relationship between the child's misconduct and his/her handicap. If a causual [sic.] relationship is determined by the case conference committee, the child may not be expelled or excluded, and the committee shall examine the child's current individualized education program in order to determine whether a change in that program might help prevent a reoccurrence of the misconduct. The procedures outlined in subsection (f), shall be followed in deciding upon and accomplishing such change in placement. If the case conference committee finds no causal relationship between the child's misconduct and his/her handicap, the committee shall make a written report of its findings to the superintendent of the corporation in which the child is in attendance for his/her final determination. The superintendent shall send a final report to the parent. The report to the parent shall be accompanied by a written notice informing the parent of the right to object to the case conference committee's findings before an independent hearing officer, the manner in which to request such a hearing, the right to obtain an independent educational evaluation and all other rights contained in subsections (f) and (g) which are pertinent to the hearing. Upon receipt of the report, the parent may exercise one of the following options:

(1) Request, within ten (10) calendar days, the appointment of an independent hearing officer to review the report of

the case conference committee. This request and the hearing shall follow the procedures outlined in subsection (g).

(2) Take no action regarding the case conference committee's report and thereby waive the right to object to it.

All arrangements for an expulsion or exclusion hearing may go forward immediately following the superintendent's release to the school of the case conference committee's final report. However, the filing of a request for the appointment of an independent hearing officer shall stay the expulsion or exclusion hearing until all proceedings under 510 IAC 7-1 [511 IAC 7-1] are completed.

(State Board of Education; Rule S-1, Sec III; filed Aug 25, 1978, 4:40 pm: 1 IR 681; filed Jun 29, 1981, 4:30 pm: 4 IR 1476, eff Sep 1, 1981; filed May 10, 1984, 10:30 am: 7 IR 1507, eff Mar 15, 1984) NOTE: IC 4-22-2-5 suspends the effectiveness of a rule document for thirty (30) days after filing with the secretary of state. LSA Document #83-114 was filed with the secretary of state May 10, 1984. NOTE: Transferred from the commission on general education (510 IAC 7-1-3) to the state board of education (511 IAC 7-1-3) by PL. 20-1984, SECTION 206, effective July 1, 1984.

Cited in: 511 IAC 1-6-4; 511 IAC 7-1-4; 511 IAC 7-2-1; 511 IAC 7-2-3.